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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1926
Feb. 3.

COHEN *v.* JONESCO.

Moneylender—Harsh and unconscionable Transaction—Reference to Master—Order to reopen whole of Transactions between Parties—Duty of Judge to act on Master's Certificate whether Order to reopen right or wrong—Moneylenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1.

Judgment of Finlay J. reported [1926] 1 K. B. 119 reversed.

THE action was by a registered moneylender against the defendant on certain promissory notes. The defence was that the transaction was harsh and unconscionable. At the trial before Finlay J. on January 26, 1925, it appeared that there had been a previous transaction between the parties in which the same defence was set up. When the action

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came on for trial before Avory J. on April 30, 1924, the defendant by his counsel submitted to judgment, but for a sum considerably less than that claimed. Avory J. ordered judgment to be entered for the agreed amount, but directed that the judgment should not be drawn up provided that the defendant paid certain instalments of the judgment by certain specified dates. The judgment was accordingly not drawn up; the defendant paid the first instalment, and before the second instalment became due the present transaction was entered into, the second instalment being paid out of the money then lent. Finlay J. held in the present case that the new transaction was harsh and unconscionable, and he ordered "that the whole of the transactions between the plaintiff and the defendant be reopened and a reference taken by a Master of the Supreme Court. Interest to be calculated at 20 per cent. per annum. Liberty to apply for judgment and costs." The Master certified that on the whole of the transactions the plaintiff had already been overpaid. The defendant then claimed repayment of the excess. The plaintiff objected that the judge's order directing the reopening of the earlier transaction, which had been the subject of a judgment, was made without jurisdiction. Finlay J. upheld the objection. He was of opinion that his order was one which he had no jurisdiction to make, and instead of entering judgment for the defendant for the excess payment claimed, he entered judgment for the plaintiff for the sum which, on the finding of the Master, would have been payable to him on a running account with interest at the rate of 20 per cent. if the second transaction stood by itself.

The defendant appealed.

Sir W. Schwabe K.C. and *H. Simmons* for the appellant.
Barrington-Ward K.C. and *M. Hilbery* for the respondent.

The Court (BANKES, WARRINGTON and ATKIN L.JJ.), without deciding whether the judge had any jurisdiction to make an order reopening the earlier transaction, allowed the

appeal on the ground that having made the order he was bound by it, whether it was right or wrong, and that he ought to have given effect in his judgment to the figures of the Master on the footing that the earlier transaction had been reopened.

Appeal allowed.

Solicitors for the appellant: *Halse, Trustram & Co.*
Solicitors for the respondent: *Tredgolds.*

J. F. C.

[IN THE COURT OF APPEAL.]

GUARDIANS OF THE POOR OF BARTON-UPON-IRWELL UNION *v.* GUARDIANS OF THE POOR OF WYCOMBE UNION.

Poor Law—Settlement—Illegitimate Child under Sixteen Years of Age—Settlement of Mother—Derivative Settlement—Place of Child's Birth—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

An illegitimate child was born in Lambeth in September, 1905. In February, 1909, she was sent by her mother to live in the Barton-upon-Irwell Union, where she resided without relief and without interruption until June, 1920. In March, 1909, the mother married, and from December, 1913, to December, 1924, resided with her husband in the Wycombe Union and acquired a settlement in that Union. In October, 1924, the child became chargeable to the guardians of the Wycombe Union, without having acquired any settlement in the period from June, 1920, to October, 1924:—

Held that, inasmuch as the mother was at all times removable from the Barton-upon-Irwell Union, the child, by virtue of the proviso to s. 1 of the Poor Removal Act, 1846 (amended by s. 1 of the Poor Removal Act, 1848), never became irremovable from that Union, and consequently could not be deemed to be settled therein under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876; and that, being under the age of sixteen years and not having acquired a settlement in her own right, the child, by virtue of s. 71 of the Poor Law Amendment Act, 1834, retained the settlement of her mother in the Wycombe Union and was not to be deemed to be settled in the parish in which she was born, notwithstanding the third clause of s. 35 of the same Act of 1876 and the fact that the mother's settlement was derivative.

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The provisions of the third clause have no application to children under the age of sixteen.

Opinion of Lord Watson in *Reigate Union* v. *Croydon Union* (1889) 14 App. Cas. 465, 484 and decision of the Court of Appeal in *West Derby Union* v. *Atcham Union* (1889) 24 Q. B. D. 117 followed.

Tendring Union v. *Braintree Union* [1920] 2 K. B. 647 and *Lexden and Winstree Union* v. *Windsor Union* [1921] 2 K. B. 143 overruled.

Decision of Divisional Court [1926] 1 K. B. 212 reversed.

APPEAL from the decision of a Divisional Court (1) upon a case stated by the Buckinghamshire quarter sessions.

On December 5, 1924, an order was made by justices for the county of Buckingham that the place of the last legal settlement of one Louise Brant, aged nineteen years, a single woman, and her infant child, then chargeable to the Wycombe Union, was in the parish of Worsley, in the Barton-upon-Irwell Union, and that she and her infant child be removed from the Wycombe Union to the Barton-upon-Irwell Union. From this order the Barton-upon-Irwell Union appealed to the Buckinghamshire quarter sessions.

The facts as shown in the case stated were as follows: Louise Brant was the illegitimate child of one Margaret Baxter (formerly Brant), and was born on September 25, 1905, at Clapham Maternity Hospital, 41 Jeffreys Road, Lambeth, in the county of London. Margaret Baxter (then Brant) was a spinster when Louise Brant was born. Louise Brant had no other settlement than that of her mother before March, 1909. On March 17, 1909, Margaret Brant married Ernest Baxter, with whom she resided at various places until December, 1913. From December, 1913, until the date of the justices' order, Ernest and Margaret Baxter resided continuously in the parish of Chipping Wycombe in the Wycombe Union in such manner and under such circumstances as to acquire a settlement in that parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876. In February, 1909, Louise Brant went to reside at Walkden in the parish of Worsley in the Barton-upon-Irwell Union with one George Pennington and his wife, and Louise Brant thereafter resided in the parish of Worsley without relief or interruption until

(1) [1926] 1 K. B. 212.

June, 1920. Neither Ernest Baxter nor Margaret Baxter (formerly Brant) had ever resided in the parish of Worsley. From June, 1920, until October 22, 1924, Louise Brant resided in various places without acquiring a settlement, and on the latter date she and her infant became chargeable to the guardians of the Wycombe Union. Louise Brant and her infant child had the same settlement.

The guardians of the Barton-upon-Irwell Union contended that Louise Brant at no time resided in the parish of Worsley in such manner and under such circumstances as would, in accordance with the statutes in that behalf, render her irremovable, and that by reason of the premises she was at all times incapable of acquiring the settlement relied upon in support of the order of the justices.

The guardians of the Wycombe Union contended that from and after the date of her mother's marriage in March, 1909, Louise Brant was capable of acquiring and did acquire a settlement by reason of her above stated residence in the parish of Worsley, and that the order of justices was rightly made.

The Court of quarter sessions were of opinion, having regard to the decision in *Hollingbourn Union* v. *West Ham Union* (1) and the speech of Lord Macnaghten in *West Ham Union* v. *Holbeach Union* (2), that the contention of the appellants was correct, and they therefore allowed the appeal. They stated this case for the opinion of the Court.

The Divisional Court (Lord Hewart C.J. and Avory and Sankey JJ.) allowed the appeal and reversed the order of the quarter sessions and restored the original order of the justices.

The guardians of the Barton-upon-Irwell Union appealed.

Macmorran K.C. and *H. M. Paul* for the Barton-upon-Irwell Union. The decision of the Divisional Court was wrong. The case turns upon ss. 34 and 35 of the Divided Parishes and Poor Law Amendment Act, 1876. (3) But

(1) (1881) 6 Q. B. D. 580.
(2) [1905] A. C. 450, 452.
(3) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61).
Sect. 34. "Where any person shall

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first it is necessary to refer to the Poor Law Amendment Act, 1834 (4 & 5 Wm. 4, c. 76), s. 71, which provides that "Every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." . . . . Therefore at the passing of the Divided Parishes and Poor Law Amendment Act, 1876, an illegitimate child took its mother's settlement and followed that settlement until the child attained the age of sixteen, or acquired a settlement in its own right. Now apart from s. 35 of the Act of 1876, Louise Brant never acquired a settlement in her own right in the Barton Union. It is not claimed that she acquired a settlement otherwise than under s. 34 by residence for three years in that union. But in order that she might acquire a settlement by residence it is necessary that the residence should be "in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render" her "irremovable." One of the statutes in that behalf is the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1 of which, as amended by s. 1 of the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), and s. 8 of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), provides

have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise. . . . ."

Sect. 35. "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

that no person shall be removed . . . . from any parish in which such person shall have resided for one year next before the application for the warrant. There is a proviso to this enactment which, as amended by s. 1 of the Poor Removal Act, 1848 (11 & 12 Vict. c. 111), reads thus: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act"—[i.e., the Poor Removal Act, 1846]—"and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." Margaret Brant or Baxter, the mother of Louise Brant, was a person who had a child (Louise Brant) having no other settlement than her (Margaret Brant's) own; and so the child (Louise Brant) was removable from any parish from which Margaret Baxter would be removable. But Margaret Baxter would always have been removable from the Barton Union, because she never set foot within its confines; therefore Louise Brant was always removable from the Barton Union, and consequently never acquired a settlement there: *West Ham Union* v. *St. Matthew, Bethnal Green (Guardians)* (1), overruling *Reg.* v. *Leeds Union.* (2) Never having acquired a settlement in her own right she took the settlement of her mother and followed the settlement of her mother until she attained the age of sixteen.

Then how does s. 35 of the Divided Parishes Act alter this? The first clause abolishes derivative settlements except in the case of a wife and in the case of a child, that is to say a legitimate child. The second clause deals with illegitimate children, and enacts that an illegitimate child shall retain the settlement of its mother until such child acquires another settlement. The only effect of that clause is that an illegitimate child, unless it acquires a settlement of its own, retains its mother's settlement beyond the sixteen years limited by the Poor Law Amendment Act, 1834. The result

(1) [1894] A. C. 230. (2) (1879) 4 Q. B. D. 323.

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is that Louise Brant is settled, where her mother is settled, in the Wycombe Union.

The Divisional Court have held that this is not so because of the third clause of s. 35, which provides that if any child shall not have acquired a settlement for itself, and it cannot be shown what settlement the child derived from the parent without inquiring into the derivative settlement of the parent, then the child shall be deemed to be settled in the parish in which he or she was born. Following their former decisions in *Tendring Union* v. *Braintree Union* (1) and *Lexden and Winstree Union* v. *Windsor Union* (2), the Divisional Court have held that when Margaret Baxter married in 1909, her settlement became derivative thenceforward, and so it could not be shown what settlement Louise Brant derived from her mother, Margaret Baxter, without inquiring into the derivative settlement of Margaret Baxter; therefore by the third clause of s. 35 of the Divided Parishes Act Louise Brant from March, 1909, onwards was to be deemed to be settled in Lambeth, the parish in which she was born; and that, having from that time onwards a settlement other than her mother's settlement, she came within the principal enactment of s. 1 of the Poor Removal Act, 1846, as amended, and not within the proviso; with the result that in February, 1910, she became irremovable from the Barton Union and in February, 1912, acquired a settlement in that union which she has never lost. But these decisions of the Divisional Court are opposed to the expressed opinion of Lord Watson in *Reigate Union* v. *Croydon Union* (3), where speaking of the third clause of s. 35, he says: "The provisions of the clause have, in my opinion, no application to children under the age of sixteen, and do not qualify the preceding enactment of s. 35 to the effect that a legitimate, or that of 4 & 5 Wm. 4 to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subjects of inquiry are not unemancipated,

(1) [1920] 2 K. B. 647. (2) [1921] 2 K. B. 143.
(3) 14 App. Cas. 465, 484.

but are paupers in their own right, and capable of acquiring a settlement for themselves." This opinion of Lord Watson was followed by the Court of Appeal in *West Derby Union* v. *Atcham Union*. (1) The decision of the Divisional Court is also opposed to the opinion of Lord Macnaghten in *West Ham Union* v. *Holbeach Union*. (2) In that case the pauper lived with her mother and her mother's husband; but in other respects there is no material distinction between that case and the present. It is clear that before 1876 an illegitimate child did not lose its mother's settlement on the mother's marriage: *Reg.* v. *St. Mary Newington* (*Inhabitants*) (3), referred to by Lord Watson in *Reigate Union* v. *Croydon Union*. (4) The child followed its mother's settlement, whether derived from a husband or acquired in her own right, until it reached sixteen or acquired a settlement in its own right. If the child reached sixteen without acquiring a settlement in its own right it became settled in the parish in which it was born: *Bodenham Overseers* v. *St. Andrews Overseers*. (5) The object of cl. 3 of s. 35 of the Act of 1876 is "to place illegitimate, as nearly as may be, on the same footing with legitimate children"—see per Lord Watson (6)—who, by the second clause take the settlement of father or widowed mother, as the case may be, up to the age of sixteen and retain the settlement so taken until they acquire another. It is said that Lord Watson's opinion was merely an obiter dictum, and that it is inconsistent with *West Ham Union* v. *Holbeach Union* (7); *Fulham Parish* v. *Woolwich Union* (8); and *Hackney Union* v. *Kingston-upon-Hull Incorporation*. (9) The first of those cases decided that an illegitimate child, living with her mother and her mother's husband in one parish for three years without a break and without relief, could acquire a settlement before reaching the age of sixteen years. The second case decided that an illegitimate child by residence with its putative father under

(1) 24 Q. B. D. 117.
(2) [1905] A. C. 450, 452.
(3) (1843) 4 Q. B. 581.
(4) 14 App. Cas. 465, 483.
(5) (1853) 1 E. & B. 465.
(6) 14 App. Cas. 483.
(7) [1905] A. C. 450.
(8) [1907] A. C. 255.
(9) [1912] A. C. 475.

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similar conditions could acquire a settlement before reaching sixteen years. The third case decided that a legitimate child by the like residence with its deserted mother could acquire a settlement before the age of sixteen. These decisions that in certain circumstances a child under sixteen can acquire a settlement for itself, are in no way inconsistent with a provision which applies only to a child "who shall not have acquired a settlement for itself." Moreover if the view of the Divisional Court is correct it offered a short and easy way of answering the question in *Fulham Parish* v. *Woolwich Union* (1); it was mere waste of time in that case to go into the children's residence with their putative father for the term of three years in the parish of Lambeth in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render them irremovable; the settlement of their mother was a derivative settlement, and that was enough to give them a settlement in Lambeth, where they were born. The decision of the Divisional Court should be reversed and *Tendring Union* v. *Braintree Union* (2) and *Lexden and Winstree Union* v. *Windsor Union* (3), upon which that decision is based, should be overruled.

Herbert Davey for the Wycombe Union. The decision of the Divisional Court was right. Louise Brant acquired a settlement in the Barton Union. The case turns on the third clause of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876. When her mother married in 1909, Louise Brant was an illegitimate child who had not acquired a settlement for herself. She was therefore within the third clause. From that date onwards it could not be shown what settlement she derived from her parent without inquiring into the derivative settlement of her parent—the settlement which the mother derived from her husband. Therefore Louise Brant was to be "deemed to be settled in the parish in which . . . . she was born." This is, and has in several reported cases been held to be, the plain meaning of the

(1) [1907] A. C. 255. (2) [1920] 2 K. B. 647.
(3) [1921] 2 K. B. 143.

clause : *Manchester Overseers* v. *St. Pancras Guardians* (1) ; *Reg.* v. *Portsea Guardians* (2) ; *Reg.* v. *Bridgnorth Guardians.* (3) Then came Lord Watson's opinion in the *Reigate* case (4), that the provisions of the third clause have " no application to children under the age of sixteen," which had the effect of unsettling the law, until in *Tendring Union* v. *Braintree Union* (5) and *Lexden and Winstree Union* v. *Windsor Union* (6) it was recognized for what it was, a dictum, which was not necessary for the decision of the appeals before the House of Lords and was not the unanimous opinion of the House. Lord Macnaghten bases his opinion on different grounds. The reason for Lord Watson's dictum has never been satisfactorily explained. In saying that " The provisions of the clause have, in my opinion, no application to children under the age of sixteen " and then, in the next sentence, that " The clause assumes that the children whose settlements are the subjects of inquiry are not unemancipated, but are paupers in their own right, and capable of acquiring a settlement for themselves " he appears to exclude " children under the age of sixteen " from the category of children who are capable of acquiring a settlement for themselves. It seems to have momentarily escaped his notice that a child under sixteen could, and often did, acquire a settlement of its own. It is said that in *West Derby Union* v. *Atcham Union* (7) the Court of Appeal did obeisance to Lord Watson's dictum ; but the settlement there in question was that of a legitimate child, and that case is therefore distinguishable from the present case. If Louise Brant on her mother's marriage was relegated to her birth settlement, there was nothing to prevent her from acquiring a settlement by residence during three years without interruption and without relief from the guardians in the Barton Union. The proviso to s. 1 of the Poor Removal Act, 1846 (as amended by the Poor Removal Act, 1848), has no application to illegitimate

(1) (1879) 4 Q. B. D. 409.
(2) (1881) 7 Q. B. D. 384.
(3) (1882) 9 Q. B. D. 765.
(4) 14 App. Cas. 465, 484.
(5) [1920] 2 K. B, 647.
(6) (1921) 2 K. B. 143.
(7) 24 Q. B. D. 117.

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children: *Woolwich Union* v. *Fulham Union* (1) in the Court of Appeal. No doubt there is a dictum of Lord Macnaghten to the contrary in the House of Lords: *Fulham Parish* v. *Woolwich Union* (2); but that cannot overrule the considered decision of this Court. Louise Brant therefore was not removable from the Barton Union and, after residence there for three years, acquired a settlement in that union.

[*Llanelly Union* v. *Neath Union* (3) was also cited.]

Macmorran K.C. in reply.

Cur. adv. vult.

Feb. 11. BANKES L.J. This is an appeal from a decision of the Divisional Court which reversed the decision of the quarter sessions, the quarter sessions having reversed the decision of the justices. The question which has to be decided is whether the respondents here, the guardians of the Wycombe Union, were entitled to an order for the removal of a pauper from the Wycombe Union to the Union of Barton-upon-Irwell, in the county of Lancaster. The justices decided that they were entitled to such an order. The quarter sessions took the opposite view, and the Divisional Court restored the order of the justices.

These questions of the settlement and the irremovability of an illegitimate pauper are so overloaded with authority that, to use a common phrase, it is hard to see the wood for the trees. I propose to say as little as I can about the authorities and to confine myself mainly to the facts and the statutes.

The pauper was an illegitimate child born at Lambeth in the year 1905. After residing with her mother for some three years she was sent in February, 1909, to reside with some people who lived in a parish in the Barton-upon-Irwell Union. She resided there continuously with those people until June, 1920, at which time she had not reached the age of sixteen years. Her mother married in March, 1909, but does not seem, nor does her husband seem, to have acquired

(1) [1906] 2 K. B. 240. (2) [1907] A. C. 255, 261.
(3) [1893] 2 Q. B. 38.

a settlement by residence until after 1913. In that year they went to Chipping Wycombe, and they have acquired a settlement by residence in that parish and in the Wycombe Union. In October, 1924, the pauper became chargeable in the Wycombe Union, and it was by reason of that fact that the guardians sought to relieve themselves of their responsibility by asking for the order for removal to Barton-upon-Irwell. It is material to notice that the grounds of the application were that the pauper herself had acquired a settlement by residence in the Barton Union during the time she had lived with the person, to whom she had been sent, between 1909 and 1920. So the case put before the justices and the case upon which the Wycombe guardians relied was that the pauper had acquired by residence a settlement in a Union other than the one in which she was chargeable. There are three statutes which need consideration. The first is the Poor Law Amendment Act, 1834, s. 71. There are the Poor Law Removal Acts of 1846 and 1848, which are to be read as one with the Act of 1834, and there are two sections of the Divided Parishes Act, 1876, to which I will shortly call attention. Sect. 71 of the Poor Law Amendment Act, 1834, provides that "Every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." Then come the Acts of 1846 and 1848. It is only material to call attention to the proviso of the Act of 1846, amended by the Act of 1848, which deals with removal only and the powers and possibilities in reference to removal. The object of the proviso is to secure that the child and the parent shall as far as possible be treated as either removable or irremovable, as the case may be, so that they shall not be separated. The provision is in these terms: "Provided always, that whenever any person should have a wife or children"—I will leave out the immaterial words—"having no other settlement than . . . . her own, such . . . . children should be removable from any parish or place from which . . . . she would be removable, notwithstanding any

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provisions of the said recited Act, and should not be removable from any parish or place from which she would not be removable by reason of any provision in the said recited Act." It is not in dispute here that the mother of this pauper was always removable from the parish of Barton-upon-Irwell. The only other observation I desire to make about this proviso is that I think it is settled law that this proviso applies to illegitimate children as well as to legitimate children. That was decided by *West Ham Union* v. *St. Matthew, Bethnal Green (Guardians)* (1), explained, if it was necessary to explain it, by *Fulham Parish* v. *Woolwich Union* (2); and in *Braintree Union* v. *Rochford Union* (3) a Divisional Court, of which I happened to be a member, treated the law as settled by those two decisions. I only refer to that last case as an instance in which the Divisional Court then treated it as settled law that the proviso applies to an illegitimate child as well as to a legitimate child. Whether in future this point will be treated as settled I do not know, but I hope so.

Now I pass to the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, s. 34 of which creates a status of settlement by residence, not by residence alone, but by residence coupled with irremovability, and the section provides that: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." We are dealing here not with derivative settlements, but with the settlement which is created by the statute as the result of three years' residence, coupled with irremovability over the whole of that period, and, speaking for myself, I think in this case, where the case made for the respondents on this appeal was that this pauper had acquired a settlement by residence in the Barton-upon-

(1) [1894] A. C. 230. (2) [1907] A. C. 255.
(3) (1911) 106 L. T. 569.

Irwell Union, as soon as it was shown that the child was not irremovable during any portion of the alleged residential period, they have failed to establish a residence plus irremovability during any portion of that period.

The decision of the Divisional Court proceeded upon the view that when the mother married the whole position in reference to the child altered, and that, because from the time of the marriage the mother took a derivative settlement from her husband, the child, not having acquired a settlement for itself, fell within the third clause of s. 35 and was to be deemed to be settled in the parish in which it was born, and then became capable of acquiring a status of irremovability and a settlement through her residence in Barton-upon-Irwell. Now this argument is based on the assumption that the third clause of s. 35 has some reference to a child, an illegitimate child, or a legitimate child for that matter, under the age of sixteen. Here I think it is a great pity that the law has not been treated as settled by what Lord Watson said in the *Reigate* case. (1) That case was decided in 1889, and in the same year in the *West Derby* case (2) the Court of Appeal, a very strong Court consisting of Lord Esher and Lindley and Lopes L.JJ., having in my opinion waited for the decision in the *Reigate* case (3), deliberately stated as the view of the Court of Appeal that the law as laid down by Lord Watson was the true construction of this third clause of the section. I do not think that Lord Watson ever intended to say, or did say, that a child under sixteen could not acquire a settlement by residence, assuming of course that it complied with the other provisions of s. 34 of the Divided Parishes Act; but he clearly did say that in his opinion the third clause of s. 35 had no application to a child under sixteen. I am not going to express my own opinion or to argue about it, but I do say most emphatically that the Court of Appeal as long ago as 1889 decided, and it is a decision of the Court of Appeal, that the construction put by Lord Watson upon the third clause of s. 35 is the true construction and the law.

(1) 14 App. Cas. 465, 484. (2) 24 Q. B. D. 117.
(3) 14 App. Cas. 465.

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When that was recognized as the law so long ago as 1889, and when, no doubt, it has been acted upon and treated as the law by persons whose duty it is to advise guardians in such matters, I think it is lamentable that in 1920 and 1921, in the *Tendring Union* case (1) and the *Lexden and Winstree Union* case (2), the Divisional Court should be found criticizing Lord Watson's opinion and the decision of the Court of Appeal, and treating Lord Watson's opinion as open to question on the ground that it was not accepted in subsequent cases. The two cases upon which they rely as not supporting Lord Watson's view are *West Ham Union* v. *Holbeach Union* (3) and *Fulham Parish* v. *Woolwich Union.* (4) If those cases are looked into it will be seen that in neither of them did the House of Lords deal with s. 35 at all. Both those cases related to the settlement of a child under s. 34, and in both cases the House of Lords decided that the child, being irremovable for the requisite time and under the requisite conditions, because the parent was in like manner irremovable, had acquired a settlement under s. 34, although it was under sixteen. Now that has nothing to do with the point decided by Lord Watson, and I hope we may come back again to the view of the law that was laid down by Lord Watson and accepted by the Court of Appeal as long ago as 1889, and if so, possibly some of the troubles that have arisen in this case and the expense which necessarily ensues may be avoided.

In my opinion, for the reasons I have endeavoured to give, the view originally taken by the justices was wrong, the view taken by the quarter sessions was right, and under those circumstances the appeal will be allowed and the decision of the quarter sessions will be restored.

WARRINGTON L.J. The question to be decided is whether a pauper who has become chargeable to the Wycombe Union had acquired by residence a settlement in the Barton-upon-Irwell Union and is therefore removable from Wycombe to

(1) [1920] 2 K. B. 647.
(2) [1921] 2 K. B. 143.
(3) [1905] A. C. 450.
(4) [1907] A. C. 255.

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Barton. The justices made an order for her removal. This order was quashed by quarter sessions, and has been restored by the Divisional Court, and the Barton Union appeals. The pauper is the illegitimate daughter of one Margaret Brant and was born on September 25, 1905, in the Lambeth Union, the mother being then a spinster. On March 17, 1909, the mother married, and she has derived from her husband, as a derivative settlement, a settlement in Wycombe. From February, 1909, until June, 1920, the pauper resided with strangers at Barton, being throughout that period under the age of sixteen. The Divisional Court have held that from and after the marriage of her mother in March, 1909, the pauper lost her mother's settlement and was free to acquire a settlement by residence, and that she did in fact acquire such a settlement in Barton. The question is whether this decision is correct. Settlement by residence may now be acquired under s. 34 of the Divided Parishes Act of 1876, which provides: "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish. . . . ." Irremovability, therefore, is, under that provision, a condition of the acquisition of settlement by residence. Was the pauper in this case irremovable from Barton? The Barton guardians say she was not, because the mother was movable from Barton, and if the mother was movable from Barton then the child was also, and in support of that contention they rely on the proviso to s. 1 of the Poor Removal Act of 1846, which proviso is now to be found enacted in the Poor Removal Act of 1848. Now I think I must read that proviso, because a good deal of what I have to say turns upon the exact words of it. "Provided always, that whenever any person should have a wife or children"—I may leave out "wife" and read it: "whenever any person should have a child having no other settlement than her own, such child should be removable from any parish or place from

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which she would be removable, notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which she would not be removable by reason of any provision in the said recited Act." The answer made by the respondents to the contention of the appellants founded on that proviso is two-fold. First, it is said that the proviso does not apply to illegitimate children at all. Secondly, it is said that the pauper in this case was not a child having no other settlement than that of the mother, but that by virtue of the third clause of s. 35 of the Act of 1876, already referred to, she had her birth settlement, a settlement in Lambeth, and was therefore not within the proviso, which only applies to the case of children having no other settlement than that of the mother. In effect this contention of the respondents raises the issue whether by the mere fact of the marriage of the mother the child ceased to follow her settlement as provided by the Act of 1834.

I will first deal with the first of the two contentions on the part of the respondents, that is to say that the proviso to s. 1 of the Act of 1846—it was amended in 1848, but it is to be read as a proviso to the Act of 1846—has no reference to illegitimate children. In my opinion that question is settled against them by the decision of the House of Lords in the *Fulham* case (1), and particularly by the opinion of Lord Macnaghten, who says: "It appears to me that the proviso at the end of s. 1 of the Act of 1846 . . . . must apply to illegitimate children as well as to legitimate children," that view having been followed also in the Divisional Court in the *Braintree* case (2), referred to by Bankes L.J. The law on that point is, in my opinion, settled, and the proviso must be treated as being applicable to illegitimate as well as legitimate children.

That disposes of that contention. With regard to the second contention, that raises the old question of the true interpretation and effect of the third clause of s. 35 of the Act of 1876. The first two clauses of that section are to this effect: the first of the two clauses abolishes derivative settlements

(1) [1907] A. C. 255, 261. (2) 106 L. T. 569.

except in two cases, that of a wife from her husband, and that of a child under sixteen, "which child"—that is a legitimate child in this part of the section—"shall take the settlement of its father or its widowed mother, as the case may be, up to that age and shall retain the settlement so taken until it shall acquire another." The second is: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." Now when those clauses are read in connection with s. 71 of the Act of 1834, and in relation to illegitimate children, which alone we have to consider, the effect is that up to the age of sixteen the illegitimate child follows, to use the words of s. 71, the settlement of the mother till that age, and after that age retains that settlement until such child acquires another settlement, but that it is the original enactment of 1834 that still provides for the settlement of the illegitimate child up to the age of sixteen. Up to that age it cannot in my opinion obtain a settlement by residence in a parish apart from its mother, because under the proviso to the Act of 1846 the mother not being irremovable, the child would not be irremovable, and would therefore not fulfil the necessary conditions for the acquisition of a settlement by residence, unless indeed, as in the *Fulham* case (1), it secures irremovability by living with its putative father, as one of the relations referred to in the Act. This view is in accordance with the view expressed by the House of Lords in the *Holbeach* case (2), because the pauper in that case was living with her mother, one of the persons enumerated in the section referred to. But it is said by the respondents that inasmuch as the settlement of the mother is, after marriage, a derivative one, the provisions of s. 71 of the Act of 1834 cease to apply and the child acquires ipso facto a new settlement—namely, that of its birth. Now the third clause of s. 35 of the Act of 1876 is in these terms: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female

(1) [1907] A. C. 255. (2) [1905] A. C. 450.

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derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." Now, to say the least of it, that is a very roundabout way of effecting an object which, if the Legislature had intended it, could have been attained by a direct enactment to that effect. If the clause is to be interpreted in the way in which the Divisional Court have interpreted it, the clause would produce some very startling results; if a spinster with child by one man were to marry another on the eve of the child's birth, the child would not follow the mother's settlement and would have no settlement at all but that of its birth. But, in my opinion, the case is finally settled by authority, and was so settled so long ago as the year 1889, and I share with Bankes L.J. regret that the Divisional Court should in at least two cases have treated the law as still open and have declined to be bound at all by the judgment of Lord Watson, which I will refer to directly, or by the deliberate decision of the Court of Appeal to the effect that that judgment must be taken to have settled the law on the point. The opinion of Lord Watson is to be found in the *Reigate* case. (1) In that case the argument began on December 13, 1888, was continued in May, 1889, and the opinion of the House was delivered on August 8 in that year. We know from a subsequent decision, to which I will refer presently, that the Court of Appeal had expressed the wish that the House of Lords should finally settle the question which had arisen with regard to this sub-section, and I think the elaborate opinion of Lord Watson was probably prepared and delivered in compliance with that wish. But however that may be, Lord Watson did deliver a considered opinion on the subject, and he came to the conclusion that the provisions of the clause in question have no application to children under the age of sixteen and do not qualify the preceding enactment of s. 35, to the effect that a legitimate child, or that of the Poor Law Amendment Act, 1834, to the effect that an illegitimate child, shall continue to retain its

(1) 14 App. Cas. 465.

parent's settlement until it has reached that age. I ought to say before I leave the judgment of the House of Lords that of that judgment of Lord Watson it was said by Lord Fitzgerald (1): "I have had an opportunity of reading and considering the excellent judgment which has just been delivered by my noble and learned friend opposite, and I concur in the interpretation which he has put upon ss. 34 and 35. I also concur in the conclusions at which he has arrived upon the three appeals before us." We have therefore Lord Watson delivering that elaborate opinion and Lord Fitzgerald concurring in it. The other two noble Lords who took part in the decision expressed no dissent, though I think we may safely conclude that they had previously seen and considered the judgment of Lord Watson, although they did not in terms express the view which he expressed. But the matter does not rest there. There is in *West Derby Union* v. *Atcham Union* (2), in the same year, 1889, a judgment of this Court, then consisting of Lord Esher M.R., and Lindley and Lopes L.JJ. That judgment was delivered on October 26, 1889, which must have been shortly after the publication of the opinion of the House of Lords in the *Reigate* case. (3) I need not read Lord Esher's judgment. It is enough to read that of Lindley L.J. Lindley L.J. says (4): "It must be borne in mind that before those cases went to the House of Lords the decisions were by no means easy to reconcile. Very few modern Acts of Parliament have been more discussed than this, and the House of Lords having before it three cases, delivered judgment in all three at one time for the purpose of putting an interpretation upon this Act of Parliament which should operate as a guide to us and to others. It would be wrong, in my opinion, not to carry into effect that interpretation so put by the House of Lords upon the statute, and I do not think in future it will be thought to be of any use to fall back upon the earlier decisions, many of which are extremely difficult to reconcile with each

(1) 14 App. Cas. 487.
(2) 24 Q. B. D. 117.
(3) 14 App. Cas. 465.
(4) 24 Q. B. D. 121.

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other. The interpretation put by the House of Lords must be, and indeed ought to be, the guiding interpretation, and, adopting that view, it is obvious that this appeal must be allowed." The point which arose in that appeal was the precise point, and it was decided that the prohibition in s. 35 from inquiry into the derivative settlement of the parent had no application to children under the age of sixteen and did not prevent the inquiry into the mother's settlement when the child was under that age. It seems to me to be a great pity that the Divisional Court did not act upon the judgment of the Court of Appeal, by which they were bound as well as we are, and did not adopt, as the Court of Appeal did, the judgment of Lord Watson as expressing the authoritative view of the House of Lords. Of course, the case might be different if, since the decision of the *Reigate* case (1) and the decision of the Court of Appeal in the *West Derby* case (2), it could be shown that there was a subsequent decision of the House of Lords to the opposite effect. But there is no such decision. On the contrary, in expressing his opinion in the *Fulham* case (3), which was one of the cases cited to us as having thrown some doubt upon the opinion of Lord Watson, Lord Macnaghten founds his opinion on the assumption that the three years' residence with the putative father alone rendered the illegitimate child irremovable and able to acquire a settlement apart from its mother, and that but for that residence the child would have been removable to the mother's place of settlement, although that settlement was derivative. Lord James expresses the same view. (4) He also refers to and concurs in the judgment of Stirling L.J. in the Court of Appeal in the same case. (5) I have looked at that judgment and I find nothing in it which supports the view that he formed any opinion of s. 35 different from that expressed by Lord Watson. On the contrary, he adopts, as far as I can understand, the view on that particular point of the noble Lord. The point on which the judgment of the

(1) 14 App. Cas. 465.
(2) 24 Q. B. D. 117.
(3) [1907] A. C. 255, 262.
(4) [1907] A. C. 263.
(5) [1906] 2 K. B. 253.

Court of Appeal in that case rested was that the proviso to the Act of 1846 did not apply to illegitimate children, and this point, of course, is disposed of, as I have already pointed out, by Lord Macnaghten in the House of Lords. In these circumstances I have no hesitation in saying that the Divisional Court and this Court alike are bound to treat this case on the footing that during the whole of her residence at Barton the pauper was removable, because her mother was removable, from that union, and accordingly that her residence in Barton did not satisfy the statutory condition of irremovability, and a settlement was therefore not acquired. It follows, I think, that the two cases in the Divisional Court, the *Tendring* case (1) and the *Lexden* case (2), ought to be treated as overruled.

I agree that the appeal ought to be allowed and the order of quarter sessions restored.

ATKIN L.J. I agree. The question arises here as to the settlement of a woman who was an illegitimate child. She was born in 1905, and in February, 1909, shortly before her mother's marriage, she went into residence in the Barton Union, staying with friends, or possibly being boarded out, as very often illegitimate children are, the mother being about to marry. She remained in the Barton Union until she was about the age of fifteen; she never subsequently acquired a settlement of her own, and eventually she went to reside in the Wycombe Union, where her mother and her mother's husband were apparently then living, and she then gave birth to an illegitimate child and they both became chargeable to the Wycombe Union. The Wycombe Union now seeks to repudiate the chargeability and they say that it ought to be borne, both as to the mother and her child, by the guardians of the Barton Union, because they say that the pauper acquired a settlement there by residence. They cite the third clause of s. 35 of the Act of 1876 and say the effect of that third clause is to prevent anybody deriving a settlement from his father or his mother,

(1) [1920] 2 K. B. 647. (2) [1921] 2 K. B. 143.

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or from anybody else, when the settlement from which they seek to derive it is a derivative settlement, and they say that in this case when the mother of the pauper married for the first time in 1909 she derived a settlement from her husband, that the illegitimate child therefore—the pauper in this case—at once derived a settlement from her mother, which would be a derivative settlement, and therefore the provision of the third clause applies and the settlement of the pauper was thenceforth to be deemed to be the settlement of her birth, and they say, that being so the pauper had a settlement which was not the settlement of the mother, and thereupon became capable of acquiring a settlement for herself by residence and irremovability under s. 34. They say therefore this pauper, after residing for four years between the age of three and a half and seven and a half in the Barton Union, acquired a settlement in that union which it has never lost. In that way it is said that the Barton Union ought to bear the charges of this pauper and her child. That view has been accepted by the Divisional Court.

It appears to me, with great respect to the Divisional Court, that this case is concluded by an express decision of this Court to the contrary on this very point which has been decided by the Divisional Court—namely, the *West Derby* case. (1) That arose from a consideration of Lord Watson's judgment in the *Reigate* case. (2) That was a decision of the House of Lords upon the meaning of ss. 34 and 35 of the Act of 1876. It is impossible to discuss a question of this kind, as Mr. Davey quite properly reminded us, without bearing in mind roughly the history of the legislation, and that history shows the desire of the Legislature to mitigate the hardships of the original Poor Law and to provide that children shall not be separated from their parents when they come to be charged to the Poor Law. Thus from early times efforts have been made to secure that, at any rate during youth, the mother and child or father and child should not be separated, and before the Act of

(1) 24 Q. B. D. 117. (2) 14 App. Cas. 465.

1876 it was the law that a legitimate child took the settlement of its father, and that an illegitimate child took the settlement of its mother, and there were provisions which also guaranteed that a child should not acquire a status of irremovability unless its father or mother was irremovable also, and that it should not be removable from a place from which the father or mother was irremovable.

Now if the Divisional Court has rightly interpreted the third clause of s. 35 it follows that a child no longer derives its settlement from its father or mother if the settlement of the father or mother, as the case may be, is or becomes a derivative settlement. That means that an illegitimate child loses its mother's settlement as soon as the mother marries again, whatever the age of the child may be, and never attains the settlement of its mother if at the time of the birth the mother had a derivative settlement; for instance, if she had acquired no other settlement than the settlement of her father or mother, as the case may be. So that in those cases the operation of the rule of law which is expressly stated in the second part of s. 35, that the child retains a settlement of its mother, would have no operation. But this interpretation does not affect an illegitimate child only, it also applies to legitimate children; these children by the first clause of the section take the settlement of the father up to the age of sixteen; but this provision again is rendered inoperative by the third part, where the father's settlement is a derivative settlement, as it is where the father has not acquired a settlement of his own. Similarly the child loses the settlement of its widowed mother, for that is a derivative settlement, until the widowed mother acquires a settlement of her own. If the third clause has these remarkable results it certainly made a profound change in the law, and the change was entirely contrary to the spirit of the legislation up to the date of that Act. That, of course, is no reason for denying the plain meaning of the words if it has to be so taken, but fortunately it is not for this Court, nor have the Divisional Court, to interpret the words of the section, for their meaning has been authoritatively declared by the House of Lords.

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Beyond all question Lord Watson in the *Reigate* case (1) expressly states that the third clause of s. 35 has no operation in the case of children under the age of sixteen, whether legitimate or illegitimate; and in so saying he was not dealing with the question whether a legitimate or an illegitimate child could acquire a settlement for itself by residence or in any other way. The third clause is not concerned with the acquisition of a settlement by residence. It is substituting a statutory settlement of birth for a derivative settlement in the conditions there mentioned, and I think Lord Watson is plainly stating that a child under the age of sixteen does not under that clause acquire a statutory birth settlement. But it is said that when Lord Watson said that he was only expressing an obiter dictum. My brother Warrington has described the circumstances in which that judgment was delivered. I would add that an obiter dictum of Lord Watson is not to be lightly disposed of. But it is not open to us, and with great respect it is not open to a Divisional Court, to treat Lord Watson's statement as an obiter dictum, because the Court of Appeal has decided in terms that it was not, and Divisional Courts are bound by that decision. The very point was dealt with by Lord Esher M.R. in *West Derby Union* v. *Atcham Union*. (2) There the Court of Appeal had to determine the settlement of a legitimate child under the age of sixteen whose father had died when the child was aged four. The mother had only a derivative settlement. The child had lived with the father; and the mother had not acquired any settlement in her own right since her husband died. It was said on the one side that cl. 3 applied and that the child must be deemed to be settled in the union in which it was born. On the other hand, it was said: No, she takes her mother's settlement, and the question is what that was. Lord Esher said this: "What is important to-day is what is the view taken by the House of Lords of the interpretation of the third part of the 35th section. It is plain that Lord Watson has taken a distinct and clear view, and has stated it clearly, of what is the effect, to a certain extent at

(1) 14 App. Cas. 465, 484. (2) 24 Q. B. D. 117, 120.

all events, of the third clause. He says, in terms, that the third clause only applies to the case of children above sixteen, and does not apply to the case of children under sixteen. The case of children under sixteen is dealt with by the first two paragraphs. The third paragraph does not deal with the case of settlement, or removal, or chargeability with regard to children under sixteen. It is admitted if we adopt that view, then this case must be decided according to the contention of the appellants; but it was said that we were not bound by that view of Lord Watson, because it was not necessary for the decision of the three cases before him. I think it would be wrong of this Court after asking for the interpretation of the House of Lords on the whole section, and after that House has construed the section, to disregard that construction on the ground that it was not necessary for the decision of the actual case. I cannot do that, and therefore I bow to the decision of the House of Lords, and look upon it as governing what the interpretation must be." Therefore they adopted the view of Lord Watson on this very point on which he is said to have only expressed an obiter dictum—namely, that you are not to look at a birth settlement under the section in cases where children are under sixteen. That decision, as I have said, is plainly binding upon us, just as, to my mind, it was plainly binding upon the Divisional Court in this case and in the *Tendring* case (1) and in the other cases, and I rather regret the *West Derby* case (2) does not appear to have been cited to the Divisional Court in this case.

I do not think it is necessary to say more about it than this. Before the decision in the *Reigate* case (3) in the case of *Reg.* v. *Marylebone Guardians* (4) the Court of Appeal had taken the view which is taken by the Divisional Court in this case. The Court consisted of Lord Esher, who was then Sir William Brett M.R., and Bowen and Fry L.JJ. Fry L.J. in terms had stated what could not be plainer, according to his view (5): "The result of the enactment is that an

(1) [1920] 2 K. B. 647.
(2) 24 Q. B. D. 117.
(3) 14 App. Cas. 465.
(4) (1884) 13 Q. B. D. 15.
(5) 13 Q. B. D. 25.

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illegitimate child is to take the settlement of his mother, if that settlement is not derivative; but if it is derivative he must be deemed to be settled in the parish where he was born." Now it is after that decision that Lord Watson gave his judgment, and I cannot help thinking that it is with reference to that decision that he used these words (1): "Since the passing of the Act there have been numerous decisions upon the import of the exceptions by Divisional Courts and in the Court of Appeal, but these authorities are marked by such a degree of fluctuation and inconsistency that I do not think any advantage can be gained by referring to them. I may observe, however, that the structure of the clause, which begins with the sweeping declaration that 'no person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise,' has induced many of the learned judges to favour a construction of the excepted cases which appears to me to be unduly severe." As I have said, in the *West Derby* case (2) this case of *Marylebone* (3) was quoted to the Court of Appeal, where one member of the Court was Lord Esher, who had been a party to the *Marylebone* decision (3), and he deliberately set it on one side and adopted the view taken by the House of Lords. That decision, therefore, binds us unless it has been overruled, and it appears to me that there is no decision overruling it, no decision of the House of Lords, which of course is the only authority that could overrule it; on the contrary, as far as I can see, when the decision has been mentioned in the House of Lords nothing has been said even to suggest a dissent from the view expressed by Lord Watson on this particular point. In fact this particular point has never arisen before the House of Lords. It is true that cases have arisen in the House of Lords which have raised the question whether or not a legitimate or an illegitimate child can acquire a settlement for itself by residence under the age of sixteen, and if on this point or in his judgment Lord Watson expresses a view contrary to that, that has been overruled;

(1) 14 App. Cas. 481. (2) 24 Q. B. D. 117.
(3) 13 Q. B. D. 15.

but that is quite irrelevant to his construction of the third part of the clause, which has got nothing to do with acquiring a settlement by residence. In *West Ham Union* v. *Holbeach Union* (1) Lord Macnaghten, who was a party to the decision in the *Reigate* case (2), quotes Lord Watson, and as far as I can see quotes him without suggesting that he differed in any respect from him.

In these circumstances the foundation of the respondents' main argument disappears, because this illegitimate child followed the settlement of its mother. The question is whether or not it acquired a settlement by residence. That turns upon the wording of the proviso to s. 1 of the Poor Removal Act, 1846, or the amended form of that proviso. Now the first part of the argument on the proviso was that the words: "Whenever any person should have a wife or children having no settlement other than his or her own," do not apply where the mother of an illegitimate child has subsequently married, because then the child has a settlement other than that of its mother—namely, its statutory birth settlement. That contention has been disposed of. Then comes the contention that the section itself has no application to illegitimate children. This view had been expressed by the Court of Appeal in the *Fulham* case. (3) It was expressly dissented from by Lord Macnaghten in the House of Lords (4), and though it may be fairly said that his opinion is not the judgment of the House of Lords, inasmuch as the House affirmed the judgment of the Court of Appeal on different grounds, it leaves it open to us to consider whether or not Lord Macnaghten's opinion was right, and I am satisfied that it is the right decision, and that, for the reasons given by him, the proviso does apply to the mother of an illegitimate child and to illegitimate children.

Then we come to the last stage of this argument, because, if the proviso does apply to illegitimate children, it cannot be disputed that this illegitimate child under the age of sixteen never did acquire a settlement in Barton, because at no time

(1) [1905] A. C. 450, 453.
(2) 14 App. Cas. 465.
(3) [1906] 2 K. B. 240.
(4) [1907] A. C. 255.

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was the mother irremovable from Barton, and in these circumstances it must be admitted that the child could not obtain a settlement by residence there.

The result is that the appellants succeed in this case, and that the order made for removability to Barton was properly quashed by quarter sessions, and that the order of quarter sessions should be restored, and that the appellants should have their costs both here and below.

Appeal allowed.

Solicitors for appellants: *Reid, Sharman & Co., for Foyster, Waddington & Morgan, Manchester.*

Solicitors for respondents: *Ward & Melliar Smith, for Reynolds & Son, High Wycombe.*

W. H. G.

1926
March 19.

TOATES *v.* TOATES.

Statutes of Limitation—Personal Representatives—Administrators—Real Estate—Trustee—Express Trust—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 2—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57)—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2.

By the Judicature Act, 1873, s. 25, sub-s. 2, "no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations."

The effect of the Land Transfer Act, 1897, ss. 1 and 2, is to impose an "express trust" within the meaning of the above section on the personal representatives of the deceased person in respect of real estate, and so to prevent the Real Property Limitation Act, 1874, from running in their favour.

APPEAL from Peterborough County Court to Warrington and Atkin L.JJ. sitting as a Divisional Court.

The plaintiff was the heir at law of one William Toates, who died on April 28, 1913, intestate, leaving a widow and two children, of whom the plaintiff was the elder and the defendant the younger son. In October, 1913, the widow took out letters of administration to the estate, which included certain land at Whittlesea in the county of Cambridge. She

went into possession of this land, and so remained until July 6, 1923, when she died, having by her will devised all her real estate to the defendant. The defendant then went into possession of the land. In July, 1925, the plaintiff took out letters of administration de bonis non of his father's estate, and on September 25, 1925, he took proceedings against the defendant in the county court, claiming possession, mesne profits, and delivery up of the title deeds to the land in question.

The county court judge held that the widow as administratrix was not made an express trustee by virtue of the Land Transfer Act, 1897 (1), but a constructive trustee only, and that the plaintiff's claim was barred by the Real Property Limitation Act, 1874.

Farwell K.C. and *Elborne* for the plaintiff. By the Land Transfer Act, 1897, s. 1, sub-s. 1, real estate of a deceased person is vested in the personal representative "as if it were a chattel real"; and by s. 2, sub-s. 1, he is directed to hold such real estate as trustee for the persons by law beneficially entitled thereto.

Prior to 1897 an executor was not an express trustee for the beneficiary, and therefore the Statute of Limitations would run in his favour. But the Act of 1897 enacted that he should be a "trustee," by which was meant an express trustee. The Judicature Act, 1873, s. 25, sub-s. 2, which is still in force, provides that "no claim of a cestui que trust against his trustee for any property held on an express trust

(1) Land Transfer Act, 1897, s. 1, sub-s. 1: "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

Sect. 2, sub-s. 1: "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

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or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

There is a further point that even if the Statute of Limitations does run, it only commences to do so on the lapse of one year from the death of the intestate, when the heir or devisee was entitled to claim. Until then the Court would not order the personal representative to convey the land to the heir or devisee. Time therefore did not begin to run until a year from death, and here a period of twelve years had not expired before the plaintiff made his claim.

Further, upon a claim against the estate of an intestate, the period of limitation is twenty years in the case of personalty, including chattels real: Law of Property Amendment Act, 1860, s. 13. If real estate is placed in the same position as chattels real by the Land Transfer Act, 1897, the period of limitation should be twenty years: Carson's Real Property Statutes, 2nd ed., p. 196; and *In re Johnson*. (1)

[He was stopped.]

Jenkins K.C. and *Van Oss* for the defendant. The Land Transfer Act, 1897, did not constitute the personal representative an "express" trustee of real estate, and claims against the administrator or his successor are barred after twelve years. The period of limitation is fixed by the Real Property Limitation Act, 1874, s. 1, which was substituted for the Real Property Limitation Act, 1833, s. 2. The term "express trust" was defined by Lord Cairns in *Cunningham* v. *Foot* (2) as "a trust which arises upon the construction of a written instrument not upon any inference of law imposing a trust upon the conscience: a trust arising upon the words of the instrument itself." In *In re Davis* (3) the Court held that a suit to recover a legacy from an executor is within the Real Property Limitation Act, 1874, s. 8, unless that legacy is vested in him on express trusts. A mere constructive trust will not prevent the statute from being a bar. This case was followed in *In re Lacy* (4), where the Court was dealing with a claim under the Executors Act, 1830. In

(1) (1885) 29 Ch. D. 964.
(2) (1878) 3 App. Cas. 974, 984.
(3) [1891] 3 Ch. 119.
(4) [1899] 2 Ch. 149.

In re Davis (1) Lindley L.J. said: "An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own, but such a trust does not take the case out of the statute." If the Land Transfer Act, 1897, Part I., be looked at as a whole, it will be seen that the Act was passed in order to shorten the administration of the estates of deceased persons and to cheapen it. It was not intended to impose an express trust on the legal personal representative. The true distinction between an express trust and a constructive trust is that the one arises by written instrument, the other by operation of law. If it were intended by statute to create an express trust, such trust would be clearly defined. As regards the second point, the Real Property Limitation Act, 1833, s. 3, states clearly that "when a person claims the estate of a deceased person who shall have continued in possession until the time of his death, and shall have been the last person entitled to such estate who shall have been in possession, then such right shall be deemed to have first accrued at the time of such death." The time therefore begins to run from the date of the death of the intestate, and not a year afterwards.

No reply was called for.

WARRINGTON L.J. [after stating the facts:] The question at issue in this case is whether the plaintiff's claim is barred by the Real Property Limitation Act, 1874, and the answer depends on whether the administratrix was an express trustee within the Judicature Act, 1873, s. 25, sub-s. 2, which provides: "No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust shall be held to be barred by the Statute of Limitations." The distinction between an express trust and other forms of trust is to be found in the judgment of Lord Cairns in *Cunningham* v. *Foot* (2), where he was dealing with the Executors Act, 1833, s. 25. He said that an express trust was "a trust which arises upon the construction

(1) [1891] 3 Ch. 119. (2) (1878) 3 App. Cas. 974, 984.

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of a written instrument, not upon any inference of law imposing a trust upon the conscience: a trust arising upon the words of the instrument itself."

Here the land in question belonged to a person who died intestate. By the law as it stood before 1897 real estate vested in the heir, that is to say, the plaintiff in the present case; but the Land Transfer Act, 1897, interposed, and provided by s. 1, sub-s. 1, that real estate of a deceased person should, "on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." The Act was not content with merely providing that the real estate should vest in the personal representative as if it were a chattel real. It also declared the purposes of such vesting, and in particularly, s. 2, sub-s. 1, that, subject to the powers previously declared, the personal representative should hold "as trustees for the persons in law beneficially entitled thereto."

The question is whether these provisions constituted the personal representative an express trustee, and to this I think there is only one answer. The Act expresses in precise terms the persons for whose benefit the legal personal representative shall hold, that is, for the persons by law beneficially entitled, whether it be the heir, in the case of an intestate, or the devisee if there be a will. It is by virtue of an instrument—namely, by Act of Parliament—that the trust is created, and there is plainly an express trust. It is said that if one regard the statute as a whole, its intention was to put real estate in the hands of the legal personal representative in the same position as if it were a chattel real, and that it was well settled in the case of chattels real that an executor was not an express trustee or indeed a trustee at all. That position is clearly stated by Lindley L.J. in *In re Davis*. (1) "An executor," he says, "was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own,

(1) [1891] 3 Ch. 119, 124,

but such a trust does not take the case out of the statute." That was the state of the law as regards chattels real, but in their case they do not vest in the executor by virtue of the statute, but by operation of law, and the duties in regard to them are imposed on the executor virtute officii and not by the Land Transfer Act, 1897, which for the first time vests real estate in the executor as personal representative of the deceased.

In *In re Lacy* (1) the Court was dealing with the Executors Act, 1830, which enacted that after the passing of the Act when a person died having by his will appointed executors, they should be deemed by Courts of equity to be trustees for the persons entitled under the Statutes of Distributions in respect of any residue not disposed of, unless it appeared by the will that the executors were intended to take the residue beneficially. There again it is plain from the judgment of Stirling J. that he puts upon that statute a construction which avoids the conclusion that the executor was an express trustee, because the intention of the statute was merely to make statutory an obligation which had previously been recognized in equity only. He says: "I do not think that the trusteeship created by this Act was intended to be different in its nature from that which existed previously under the rule established in Courts of equity; and if, prior to the Act, executors were not held to be express trustees, I do not think they ought now to be so held." In 1897 however the Land Transfer Act made a radical change in the position of the personal representative and the heir at law, and in creating a trust for the persons beneficially entitled the Act clearly created an express trust. It is unnecessary to consider other objections raised by the defendant. The point now decided concludes the whole matter.

ATKIN L.J. I agree. The question is whether the widow as administratrix was an express trustee or a constructive trustee only. An express trust was defined by Lord Cairns in *Cunningham* v. *Foot* (2) as "a trust which arises upon

(1) [1899] 2 Ch. 149, 159. (2) 3 App. Cas. 974, 984.

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the construction of a written instrument, not upon any inference of law imposing a trust upon the conscience: a trust arising upon the words of the instrument itself." I assume that an express trust can be created as well by statute as by a written instrument inter partes. Acts of Parliament are often passed for the purpose of creating settlements of land, and I assume that the trustees so created are express trustees. Applying Lord Cairns' words to the Land Transfer Act, 1897, Part I., I find that as regards real estate a trust is imposed on the personal representative in respect of real estate in favour of the persons beneficially entitled by law, that is, to the extent to which they are entitled. In the present case, then, we have present the three essentials—namely, the land, the trustee and the cestui que trust; and I find it impossible to say that there is not a full and completely expressed trust. Land is vested by the Act in certain persons in whom but for the Act the land would never have vested at all. It is vested in them as trustees, and the trusts are clearly defined. Unless one can say that in the absence of the word "express" there can be no express trust, I think the conclusion is inevitable, and I see no reason why the word "express" should appear in the Act any more than in a deed or written instrument. The appeal will be allowed. The plaintiff is entitled to possession of the land, recovery of the title deeds and mesne profits.

Appeal allowed.

Solicitors for the plaintiff: *Kingsford, Dorman & Co., for H. B. Hartley, Peterborough.*

Solicitors for the defendant: *Rawle, Johnstone & Co., for Hunt & Williams, Peterborough.*

F. P. F.

[IN THE COURT OF APPEAL.]

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Feb. 18, 19.

WILLIAMS *v.* STANLEY JONES AND COMPANY LIMITED.

[1924. W. 1791.]

Practice—Costs—Official Referee—Discretion of Court or Judge—Issues of Fact and Law—Costs to follow Event—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 15, *sub-s.* 2—*Rules of the Supreme Court, Order* XXXVI., *r.* 55 B—*Order* LXV., *rr.* 1, 2.

The plaintiff claimed commission on orders from various firms which he alleged he had obtained for the defendants as their traveller, in some cases at a higher rate, in others at a lower rate, per cent. on the amounts payable under contracts resulting from the orders obtained. The defendants pleaded (1.) that commission became due to the plaintiff only when they had received payment from a customer; (2.) that upon certain orders obtained by the plaintiff they had at the date of the writ received less than the sums on which the plaintiff claimed commission; (3.) that on three of those orders and on two others the higher commission was claimed while the lower was due; (4.) that another order on which commission was claimed had not been obtained by the plaintiff; and (5.) that another order, on which the plaintiff claimed 33*l.* 15*s.* commission, had been the subject of a special agreement whereby the plaintiff was to have 10*l.* commission and no more. They also paid a sum into Court to satisfy the plaintiff's claim. The case was by consent tried by an official referee, who found for the defendants on their first, fourth and fifth pleas. On their third plea he found partly for them and partly for the plaintiff. In the result he held that there was only one issue in the action—namely, whether the payment into court was sufficient—and ordered judgment to be entered for the plaintiff 14*l.* 5*s.* 11*d.* beyond the amount paid into Court, with costs on the High Court scale:—

Held, by the Court (Bankes, Warrington and Atkin L.JJ.), that the fourth plea raised a several issue within the meaning of Order LXV., r. 2, and that the defendants were entitled to the costs, if any, of that issue.

By Bankes and Warrington L.JJ. that, assuming but without deciding that the second, third and fifth pleas raised several issues, there was in the circumstances good cause for ordering that the plaintiff should have the costs of them.

By Atkin L.J., that the first and fifth pleas raised several issues, and that there was good cause for ordering that the plaintiff should have the costs of these as well as of the second and third.

How far the discretion of an official referee in dealing with the costs of an issue under Order XXXVI., r. 55 B, is affected, if at all, by the combined operation of s. 15, sub-s. 2, of the Arbitration Act, 1889, and Order LXV., r. 1, *quaere*.

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Slatford v. *Erlebach* [1912] 3 K. B. 155 considered.
Bush v. *Rogers* [1915] 1 K. B. 707 approved.
Reid, Hewitt & Co. v. *Joseph* [1918] A. C. 717 followed.
Judgment of Divisional Court [1926] 1 K. B. 255 reversed.

APPEAL from the decision of a Divisional Court (1) affirming the order of an official referee as to costs.

The plaintiff brought an action against the defendants, a firm of shopfitters, upon a specially indorsed writ claiming a balance of 103*l.* 17*s.* 4*d.* in respect of commission earned by him as an estimator and traveller. He had obtained from twenty firms orders of the total value of 15,747*l.* 1*s.*, including personal orders, i.e., those given to the plaintiff himself, and house orders, i.e., those procured in consequence of inquiries made of the defendants and by them referred to the plaintiff. On personal orders he claimed commission at $2\frac{1}{2}$ per cent. on the first 500*l.* and $1\frac{1}{4}$ per cent. on the balance of the amount of each contract. On house orders he claimed $1\frac{1}{4}$ per cent. on the whole amount of each contract. Of the total sum of 15,747*l.* he claimed commission amounting to 287*l.* 17*s.* 4*d.* Against this he gave credit for 184*l.* received by him between August 5, 1922, and April 12, 1924. For the balance of 103*l.* 17*s.* 4*d.* he issued his writ.

The defendants in their affidavit under Order XIV. admitted liability for 16*l.* 15*s.* 4*d.*, and they paid this sum to the plaintiff under an order made by the Master. In answer to the rest of the claim they insisted that commission became due from them when they received payment from their customers, and not before. An order was made that they should have leave to defend, and that the action should be tried as a short cause. In their defence the defendants admitted having received orders as alleged from ten of the firms mentioned in the statement of claim. In para. 3 of their defence they admitted having received payment from five others, but of sums less than those alleged by the plaintiff. Among these were Mme. Emme and Messrs. Domart. In para. 4 they alleged that the orders from Mme. Emme and Messrs. Domart and from two other firms, G. Coles and R. E. Jones, were

(1) [1926] 1 K. B. 255.

house orders, and not personal orders as alleged. With regard to an order alleged by the plaintiff to have been received from one C. P. Webber, the defendants admitted having received an order from Webber, but denied that the plaintiff had obtained it; and with regard to another from one Mme. Bednash, upon which the plaintiff claimed 33*l.* 15*s.* commission, the defendants pleaded that this order was executed on the terms that the plaintiff should receive 10*l.* and no more by way of commission. They brought into court 5*l.* 16*s.* 11*d.*, which they said was enough to satisfy the plaintiff's claim. An order was then made by consent that the action should be tried before one of the official referees.

The official referee, after a three days' hearing, found in favour of the defendants (1.) on the question of the agreement that the plaintiff was entitled to commission only on sums actually received by them; (2.) that the plaintiff had not procured the order from Webber; and (3.) that the plaintiff had agreed to accept 10*l.* as his full commission for Mme. Bednash's order. On the other hand, he found in favour of the plaintiff on the questions concerning the orders of Mme. Emme and Messrs. G. Coles and R. E. Jones, but against him as regards Messrs. Domart's orders. He held that there was only one issue in the action—namely, whether the defendants had paid into court enough to satisfy the plaintiff's claim—and in the result he directed that judgment should be entered for the plaintiff for the sum of 14*l.* 5*s.* 11*d.* beyond the sum paid into court, with costs on the High Court scale.

On April 15 the defendants gave notice of appeal and prayed for an order that so much of the judgment as adjudged that the plaintiff should be awarded costs on the High Court scale should be reversed, and that the plaintiff should be ordered to pay to the defendants the costs of all the issues on which the defendants succeeded. The grounds of the appeal were, among others, that the official referee was wrong (1.) in holding that there were no separate issues on which the defendants had succeeded; (2.) in failing to award the defendants the costs of the issues on which they had

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succeeded; (3.) in awarding the plaintiff costs on the High Court scale.

The Divisional Court (Shearman and Sankey JJ.) dismissed the appeal, but stayed execution pending an appeal to this Court.

The defendants appealed and prayed for an order that the plaintiff should pay the costs of all the issues on which they had succeeded and for an order defining those issues.

Eric Sachs for the appellants. The official referee and the Divisional Court were wrong in holding that there was only one issue in this action. The order referring the action was made under s. 14 of the Arbitration Act, 1889. To such a reference s. 15, sub-s. 2 (1), of the Act applies, and the award of the referee is "equivalent to the verdict of a jury."

By the proviso to Order LXV., r. 1, of the Rules of the Supreme Court, "where any action . . . . is tried with a jury the costs shall follow the event, unless the judge by whom such action . . . . is tried, or the Court, shall, for good cause, otherwise order." And by r. 2 "when issues in fact and law are raised upon a claim . . . . the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." The question whether a claim

(1) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15, sub-s. 2: "The report or award of any official . . . . referee . . . . on any such reference [i.e., any reference to an official referee under an order of the Court or a judge under s. 14 of the Act] shall . . . . be equivalent to the verdict of a jury."

Rules of the Supreme Court, 1883, Order XXXVI., r. 55 B: "Where the whole of any cause or matter is referred to an official referee under an order of Court, he may, subject to any directions in the order exercise the same discretion as to costs as the Court or a judge could have exercised."

Order LXV., r. 1: "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge: Provided . . . . that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order.

Rule 2: "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event . . . ."

raises several issues or only one issue is a question of law to be decided by the judge at the trial: *Bush* v. *Rogers* (1), affirmed in the House of Lords in *Reid, Hewitt & Co.* v. *Joseph.* (2) Then what is an issue? The defendant may raise a defence going to the whole claim or to any part thereof. Each of these defences would constitute a separate issue. An issue which has a direct and definite event in defeating the claim to judgment in whole or in part is an issue within the meaning of the rule: *Reid, Hewitt & Co.* v. *Joseph,* per Lord Finlay L.C. (3) and Lord Haldane (4); and where the case is tried by a jury the costs of each issue go to the party who succeeds upon it. (3) So it is where an action is tried by an official referee under an order of the Court, as this action was. There were the following separate issues here: (1.) the question when commission became payable, whether on receipt of the order or on receipt of payment; (2.) the matter alleged in para. 3 of the defence, that on certain orders the appellants had received sums smaller than those with which the respondent charged them; (3.) the question of house orders or personal orders raised in para. 4 of the defence; (4.) the question who obtained the order from Webber; and (5.) what were the terms of the commission on Mme. Bednash's order? The appellants were successful on issues one, four and five, and were entitled to the costs of those issues, unless good cause existed for otherwise ordering: *Carr* v. *Dougherty* (5); *Slatford* v. *Erlebach.* (6)

[ATKIN L.J. In the last named case Order LXV., r. 2, was not before the Court.]

If this case comes under Order LXV., r. 2, and the official referee in otherwise ordering under that rule had, under Order XXXVI., r. 55B, "the same discretion as to costs as the Court or a judge could have exercised," the same result follows; for although a case tried before a judge alone differs from a case tried before a jury, yet "there is such a settled practice of

(1) [1915] 1 K. B. 707.
(2) [1918] A. C. 717, 737.
(3) [1918] A. C. 734.
(4) [1918] A. C. 742.
(5) (1898) 67 L. J. (Q. B.) 371.
(6) [1912] 3 K. B. 155.

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the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial " : *Ritter* v. *Godfrey*. (1)

[*Ingram & Royle* v. *Services Maritimes du Tréport* (2) and *Meyrick* v. *Dyson* (3) were also cited.]

Secondly, there was no sufficient reason why the official referee, acting under s. 11 of the County Courts Act, 1919, should have allowed costs on the High Court scale.

Enness for the respondent. If there is any ground to support the official referee's decision no appeal will be entertained from his order : *Lever Brothers* v. *Masbro' Equitable Pioneers Society*. (4) There is no inconsistency between r. 2 and r. 1 of Order LXV. Rule 1 refers to a trial before a judge and jury ; r. 2 to a trial before a judge alone. In the latter case if issues of fact and law are raised and the judge makes no order, the costs follow the event ; but in his discretion he may otherwise order. An official referee is in the position of a judge sitting alone ; if he makes no order costs follow the event by virtue of s. 15, sub-s. 2, of the Arbitration Act, 1889 : *Carr* v. *Dougherty* (5) ; and no doubt " event " is to be read distributively, accordingly as the issues of fact and law are decided : *Reid, Hewitt & Co.* v. *Joseph* (6) per Lord Finlay L.C. But in a claim consisting of several items, when payment is made into court generally without allocation to any of the particular items, can each item be considered to raise a separate issue ? However, even if it can, there were ample grounds for giving the respondent the costs of the issues on which the appellants claim to have succeeded. Upon the first issue the case set up in their particulars failed, and the official referee found in their favour on other grounds. On the second and third the appellants succeeded in part

(1) [1920] 2 K. B. 47, 52, 53.
(2) [1914] 3 K. B. 28.
(3) (1925) 41 Times L. R. 575.
(4) (1912) 28 Times L. R. 294.
(5) (1898) 67 L. J. (Q. B.) 371.
(6) [1918] A. C. 717, 733.

only. On the fourth, Webber's order, the respondent gave evidence that he actually obtained the order; the appellants' contention was that the respondent had agreed that another traveller should have the commission upon it, so they ought not to have the costs of that issue. On the fifth, Mme. Bednash's order, the appellants succeeded, but there were no extra costs attributable to the issue raised.

With regard to the scale of costs allowed, the official referee, before whom the action was tried by consent, is an officer of the High Court. The prolonged trial was attributable to the appellants' defence, which was only partially successful.

Sachs in reply cited *Hubback* v. *British North Borneo Co.* (1)

BANKES L.J. This appeal raises a question of considerable importance. The plaintiff claimed commission as a traveller and representative of the defendants. After giving credit for amounts received by him he claimed a balance of 103*l.* 17*s.*, and gave particulars of the contracts which he said he had obtained and in respect of which his claim was made. The defendants raised several matters in their defence. In para. 1 they said it was true that they employed the plaintiff and agreed to pay him a commission, but that the commission was only payable as and when they received the amounts in respect of which it was claimed, and that many of the sums on which the plaintiff was claiming commission had not been received by them at the date of the writ. In para. 3 they alleged that as regards six orders the amounts they had actually received at the date of the writ were less than those on which the plaintiff claimed commission. Then having pleaded that the orders obtained by the plaintiff were of two classes, personal orders and house orders, and that in respect of personal orders he was entitled to a higher commission than that which was payable for house orders, they pleaded in para. 4 that in five cases where he had claimed the higher he was only entitled to the lower commission. In para. 5 they pleaded that one of the orders on which the plaintiff was claiming commission had never been obtained by him; and

(1) [1904] 2 K. B. 473.

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in para. 6, referring to another order for 2200*l.* on which the plaintiff claimed 33*l.* 15*s.* commission, they said that this order was the subject of a special bargain by which the plaintiff was to have 10*l.* commission and no more. Lastly, they paid into Court generally a sum of 5*l.* 16*s.* 11*d.* in addition to a sum of 14*l.* previously paid to the plaintiff directly under a Master's order. In that state of the pleadings the matter was by consent referred to an official referee. This comparatively small dispute occupied three days, at the end of which the official referee awarded the plaintiff a sum of 14*l.* over and above the amount paid under the Master's order and the amount paid into Court. The costs of this inquiry exceeded 200*l.* It is to be regretted that so small a matter should have caused so great an expense. The defendants appealed to the Divisional Court on the ground that the official referee ought not to have awarded the plaintiff costs on the High Court scale ; an absurd contention, because the defendants might have applied to have the case remitted to the county court, and it was largely owing to them that the case took so long. That disposes of so much of the appeal to the Divisional Court.

Then it is said that the official referee did not exercise any discretion on the question whether the action comprised several distinct issues upon some of which the defendants ought to have been allowed their costs. I do not propose to define what constitutes a separate issue, but this I do say that, if a judge or official referee, or any one else who tries a case, is asked to say whether in the particular case there are separate issues upon which special orders for costs should be made, it is the duty of the judge or whoever tries the case to rule upon that question. In saying this I do not rely only on *Bush* v. *Rogers*. (1) I find that in *Reid, Hewitt & Co.* v. *Joseph* (2) Lord Finlay said : "The judge at the trial is the proper person to decide whether there are separate issues on which the party unsuccessful in the action is entitled to his costs : *Bush* v. *Rogers* (1) ; but as the question is one of law, and not of discretion, his decision would be subject to appeal."

(1) [1915] 1 K. B. 707. (2) [1918] A. C. 717, 737.

Thus the judge at the trial has to decide two matters; first, he has to consider whether there are separate issues, and secondly, he has to exercise his discretion upon the question whether, if there are separate issues, they or any of them are issues upon which costs should be awarded. Under Order LXV., r. 2, where there are separate issues of fact or law, prima facie the person who succeeds upon an issue is entitled to costs. But the judge may otherwise order. I express no opinion on the question how far the judge's discretion is fettered by the provision of Order LXV., r. 1, to the effect that a successful party cannot be deprived of costs except for good cause. The line, if there is any, between the discretion conferred by r. 1 and that conferred by r. 2 is a very narrow one; in either case the discretion must be a judicial discretion. In this case it is sufficient to say that it was for the official referee to decide whether there were separate issues in the case, and, if there were, either to exercise a judicial discretion in allowing or refusing costs, or to decide whether there was good cause for ordering that the costs should not follow the event. The official referee seems to have held that there was only one issue—namely, whether the sum paid into Court generally was sufficient to satisfy the plaintiff's claim. The Divisional Court were of the same opinion. I cannot accept that view. The order given by Webber clearly raised a separate issue. The plaintiff asserted that he had obtained the order; the defendants denied that and insisted that the order had been obtained by some one else. That was a separate issue. The question whether, in the exercise of a judicial discretion, costs ought to be awarded on that issue has not been decided. It never arose before the official referee or the Divisional Court, because in the view there taken Webber's order did not raise a separate issue. Here the question does arise, because in our opinion there is a separate issue, and a judicial discretion must be exercised upon it. Are the defendants to have the costs of that issue? In my opinion there is no reason why they should not. The issue may have involved additional costs to a substantial amount. Whether it did or no is a matter

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for the taxing Master. One side says that numerous witnesses were called specially upon that point; the other side says that was not so. We cannot decide that question. It is for the taxing Master. We can only say that if there were any separate costs of that issue the defendants are entitled to them.

I propose to deal differently with the other alleged issues. With regard to para. 3 of the defence, assuming it raises a separate issue, upon which I say nothing, it is not one on which in our discretion we should award costs, because the facts are not established. Again assuming that para. 4 raises an issue, the plaintiff succeeds as to part and the defendants as to other part. In the result the plaintiff gets something. This is not a case in my opinion where there should be a direction concerning costs. If the matter of Mme. Bednash's order raises an issue, the question of the costs is complicated by the fact that no part of the money paid, whether with the defence or under the Master's order, was allocated to this item in the case. I do not think that costs should be awarded to the defendants on this issue, assuming it is an issue. In the result the defendants fail altogether in their contention that the costs of the action should be on the county court scale. They succeed on part of their contention concerning the separate issues, but their success involves an insignificant sum. In these circumstances the order appealed from will be varied by directing that the defendants are entitled to the costs, if any, of the separate issue in Webber's matter and that there shall be no costs of the appeals, here or below.

WARRINGTON L.J. I entirely agree and have nothing to add.

ATKIN L.J. I agree. The defendants contend that the official referee has not complied with the terms of Order LXV., r. 2, which provides that "when issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless

otherwise ordered, follow the event." It is admitted that "event" is to be read distributively in respect of the separate issues in law and fact that are raised. The meaning of "issues in fact and law" has been laid down by the House of Lords in *Reid, Hewitt & Co.* v. *Joseph* (1), where the claim was for the price of goods sold in bags and the defendants pleaded several defences: (1.) that the goods were not equal to sample and that the contract price should be reduced because of their inferior quality; (2.) that they had been overcharged on the bags; and (3.) a payment into Court of the balance said to be due. The defendants succeeded on their first defence, but failed upon the other two. It was held by the House of Lords that there was a separate issue raised by the first defence. Lord Finlay L.C. in giving judgment said (2): "The defendant may plead defences, each going only to a part of the claim, and each constitutes an issue. The question is whether an answer is shown to the part of the claim to which it is pleaded." Accordingly the defendants got the costs of that issue. That being the definition of "issues in fact and law," we have first to decide whether there were several issues raised in this action. The official referee and, I think, the Divisional Court, held there were not. If so, that was a mistake. The plaintiff was a commission agent under one contract of employment, whereby he was to receive commission upon orders obtained by him, according to the defendants' contention, when the amount of the order had been received by them; and it would seem that day by day as each amount was received by the defendants on account of an order obtained by the plaintiff he would have a separate cause of action for debt for the amount of the commission upon the amount received. His case was that by the terms of his employment he was entitled to commission as soon as an order obtained by him was accepted or executed by the defendants. Upon this dispute the defendants established their view of the contract, that commission was only due to the plaintiff as and when they received payment for executing an order. With regard to

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one order, Webber's order, the defence was that the plaintiff had not obtained that order and had not earned any commission upon it, and upon this dispute also the defendants won. Upon a third claim the defence was that, whereas the commission ordinarily payable would have amounted to 33*l.*, by a special agreement in that case the commission was only to be 10*l.* In my view each of these disputes raised a separate issue in fact. The definition and reasoning of the House of Lords lead to no other conclusion. It does not, however, follow that the party succeeding on an issue is always to have the costs of it. The question who shall have the costs turns upon the discretion given to the judge or official referee who tries the action. In this case it was the official referee.

Now the discretion of an official referee is the subject of statutory enactment and rules of Court. The Arbitration Act, 1889, provides by s. 14 that in any cause or matter if the parties consent, the Court may order the whole cause or matter to be tried before an official referee. By s. 15 the report or award of any official referee on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury. That section was probably enacted to enable judgment to be entered upon the award or an appeal to be brought from it. But then we have to consider Order XXXVI., r. 55B, which provides that "where the whole of any cause or matter is referred to an official referee under an order of Court, he may . . . . exercise the same discretion as to costs as the Court or a judge could have exercised." Now the discretion of the Court or a judge varies according as the issues of fact have been determined by a jury or not; Order LXV., r. 1, gives the Court or a judge a discretion over costs, but with a proviso that "Where any action . . . . is tried with a jury, the costs shall follow the event, unless the judge by whom such action . . . . is tried, shall for good cause otherwise order"; and it has been suggested in the present case that, as the award of an official referee is to be "equivalent to the verdict of a jury," and the official referee is given a discretion as to costs, he can only exercise his discretion

in respect of the events which follow from his award by treating them as being equivalent to the verdict of a jury, and that the costs must follow the event, unless there is good cause for otherwise ordering. On the other hand the general provision is that contained in Order LXV., r. 2, which I have read, that "when issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event."

Now it would appear quite plain that those words "unless otherwise ordered" refer to the full discretion vested in a judge under r. 1 and unlimited by the words "for good cause" in the proviso to that rule, and I should have thought that an official referee was intended to be invested with the full discretion of a judge over costs, notwithstanding that his award on issues of fact is "equivalent to the verdict of a jury," if it were not for the decision of the Court of Appeal in *Slatford* v. *Erlebach* (1), which seems to intimate that an official referee can only make a special order as to costs "for good cause." It was not necessary to the decision so to hold, and it does not appear that r. 2 was cited to the Court; the argument proceeded entirely upon r. 1. In this state of the authorities and rules of Court the question may some day arise whether the power of an official referee to deprive a successful party of costs is conditional upon there being good cause for so doing, or whether he is invested with the ordinary judicial discretion; but in the present case it is not necessary to decide that question, because, even if the power is limited by the condition that there must be good cause, the facts in this case enable us to make the order indicated by Bankes L.J. It is plain now upon the authorities that a party succeeding upon some separate issue can only get the costs of that issue by applying to the judge and getting an order to that effect; and, therefore, it was necessary for the defendants to apply for the costs of the separate issues they succeeded on, and the official referee ought to have dealt with the application on the footing that there were separate

(1) [1912] 3 K. B. 155.

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issues. He had at any rate a discretion to deprive a successful party for good cause, and it appears to me that there is good cause for giving the plaintiff the costs of the issues concerning (1.) the terms of the contract and (2.) Mme. Bednash's order. The issue concerning Webber's order seems to be on a different footing. There were separate costs incurred, separate witnesses were examined, exclusively on this matter, and there is no good cause for depriving the defendants of their costs on this issue.

There only remains the question of the difference between county court costs and High Court costs, which is no doubt the most substantial part of this appeal. Over a matter of 14*l.* the time of the High Court has been occupied for three days, and the taxed costs of one side alone exceed 200*l.* This deplorable state of things could have been obviated if the case had been remitted to the county court, and the defendants, on whose suggestion a summons indorsed with the plaintiff's consent was taken out to refer the action to an official referee, are responsible for it, and cannot complain if the official referee certified for High Court costs. I am far from saying that the mere fact that a defendant abstains from applying to remit a case to the county court is a sufficient ground for certifying costs on the High Court scale. Here the defendants did much more, and, I think, the official referee was right in certifying as he did. That being so the substantial ground of this appeal gives way. The appeal should, therefore, be allowed in part and there should be no costs of either appeal here or below.

Order varied.

Solicitors for appellants: *Judge & Priestley.*
Solicitor for respondent: *H. Davis.*

W. H. G.

Considered. PEARSON v. ROSE & YOUNG LD. [1951] 1 K. B. 275

[IN THE COURT OF APPEAL.]

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LAKE *v.* SIMMONS.

Feb. 16, 17; *March* 25.

Insurance—Lloyd's Goldsmiths' Association Policy—Theft by Customer—Larceny by a Trick—Goods "entrusted to customer"—Absence of Owner's Consent to Possession.

The plaintiff, a jeweller, was insured under a Lloyd's policy against "theft" of jewels. The policy contained a clause exempting the insurers from liability in the event of "loss by theft or dishonesty committed by any . . . . customer . . . . in respect of goods entrusted to (her) by the assured." A woman, E., one of the plaintiff's customers, with intent to steal them, induced the plaintiff to let her have possession of two pearl necklets by fraudulently pretending that she wanted them for the purpose of showing them to certain persons for their approval, with a view to purchase by them. The plaintiff did not authorize E. to pass the property in the necklets. E. disposed of the necklets for her own benefit. In an action on the policy the trial judge held that E. was guilty of larceny by a trick and not of obtaining the goods by false pretences, and that that larceny was "theft" within the meaning of the policy, and those findings were accepted by the Court of Appeal, but:—

Held, by Bankes and Warrington L.JJ. (Atkin L.J. dissenting), that the underwriters were not liable, on the ground that the case fell within the exception; the goods were "entrusted" to E., notwithstanding that at the very moment of obtaining possession she intended to steal them, for the words "entrusted to a customer" must be understood, not in a technical sense involving an inquiry into the state of mind of the person to whom the goods are delivered, but in their ordinary and natural sense—namely, of being delivered to a person in whom the party delivering would have confidence by reason of her being a customer, and the fact that the confidence was misplaced did not prevent the delivery in such circumstances from being an entrustment.

Atkin L.J., contra, was of opinion that the word "entrusted" is applicable only where the person to whom the goods are said to be entrusted obtains possession of them with the real consent of the owner; and that, as it is of the essence of larceny that the thief should obtain possession without the owner's consent, the notion of entrusting goods to a thief involves such a contradiction as to exclude the possibility of the goods in question having been entrusted to E.

Judgment of McCardie J. reversed.

APPEAL from the judgment of McCardie J. (1)

The plaintiff was a jeweller carrying on business at Exeter. The action was on a Lloyd's Insurance Policy (National

(1) [1926] 1 K. B. 366.

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Association of Goldsmiths form), dated December 28, 1922, for a period ending December 25, 1923, and underwritten by the defendant, the claim being in respect of the loss of two pearl necklets. The policy was expressed to be "against the risks of loss and/or damage by Fire, Burglary, Robbery, Theft, Accident, from whatsoever cause or misadventure to/of the property herein specified, or any part thereof, from the premises herein mentioned"—43 High Street, Exeter—"or elsewhere, and/or whilst in transit by post, railways, conveyances, and/or persons, within the limits of the United Kingdom." The "Property Insured" was expressed to be "Diamonds, Pearls, Precious Stones . . . . and all other articles usually kept in stock by jewellers, the property of Messrs. John Ellett Lake & Son, his/their own, in trust or on commission, or for which the assured is/are held to be responsible, while in his/their own custody, or in the custody of any person or persons to whom he/they may have entrusted the same on the conditions of sale or return, for valuation, or inspection, or for any other purpose whatsoever." The exception clause provided as follows: "Touching the adventures and perils to the property hereby insured which we the assurers are contented to bear and do take upon us they are the loss of and/or damage or misfortune to the before-mentioned property or any part thereof arising from any cause whatsoever except as hereinafter mentioned—viz.: (1.) Loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the post) or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured his or their servants or agents unless such loss arise when the goods are deposited for safe custody by the assured his or their servants or agents with such broker or customer or broker's customer." The claim of the plaintiff on the policy arose from the dishonesty of a woman named Esmé Ellison. In the early part of 1923 she was living with a Mr. Van der Borgh as his wife at a well-known residence at Dawlish known as Stonelands. On March 2, 1923, she called at the plaintiff's shop and gave

her name as Mrs. Van der Borgh and her address as Stonelands. She told the plaintiff's manager that she was residing there with her husband, and that her sister was engaged to marry Commander Digby of the Royal Navy. She purchased a small ring at the price of 30*l.*, and it was debited to her in the plaintiff's books as against Mrs. Van der Borgh personally. On March 6 she paid for the ring by her own cheque drawn on an account which she had shortly before opened at a local bank. On the same date, March 6, she bought from the plaintiff a pair of Sheffield dishes for 16*l.* 16*s.*, and a diamond ring for 28*l.* 10*s.*, which were debited to her as before. She paid for the dishes on March 21 and for the ring on April 4, by cheques drawn upon the same account. Later on she purchased from the plaintiff some other small articles. When she went to the plaintiff's shop on March 6 she told him that her husband intended to give her as a birthday present a necklet of the value of about 1000*l.*, and she asked the plaintiff to procure some necklets for her inspection. The plaintiff proceeded to get some from London on appro. One was a necklace of 139 pearls from Byworth & Co., priced at 700*l.*, the appro. note stating that the necklace remained the property of Byworth & Co. until invoiced by them: "You in the meantime responsible for loss or damage." Another was a necklace of 121 pearls from Wingrove & Co., priced at 750*l.*, the appro. note stating that it remained the property of Wingrove & Co. and was "to be returned in good condition and on request."

On March 16 Ellison, being shown the two above mentioned necklets, asked permission to take them away to show to her husband. This the plaintiff allowed her to do, and she took the necklets with her. He told her that the price of the 121 pearl necklet would be 1100*l.*, and that of the 139 pearls 1000*l.* On March 21 she called again on the plaintiff and brought back the 139 pearl necklet. She said that her husband had selected the 121 pearl necklet as a present for herself, and would call and pay for it shortly, but for the present was away from home yachting. She also told the plaintiff that Commander Digby wished to purchase the 139 pearl

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necklet for her sister, but could not afford to pay the whole price, 1000*l.*, in one sum. She left the necklet with the plaintiff. On March 28 she paid her fifth visit to the plaintiff and obtained leave to take away the last mentioned necklet to show to Commander Digby. The plaintiff never saw either of the necklets again nor did he ever receive any part of the price. Ellison's statements to the plaintiff were a tissue of falsehood. Mr. Van der Borgh was not her husband, and never intended to give her a pearl necklet as a present. There was no such person as Commander Digby. She immediately on getting possession of the necklets sold them through a Bristol pawnbroker. She was on October 2, 1923, convicted on her own confession of larceny of the two necklets and sentenced to sixteen months' imprisonment.

At the trial of the action McCardie J. found as facts that at the time Ellison obtained possession of each necklet she had the intent to steal; that the plaintiff gave her possession only for the purpose of her showing them to Mr. Van der Borgh or Commander Digby as possible purchasers; that she had no authority to negotiate with them on the plaintiff's behalf or to pass the property in the necklets to them; and that the plaintiff never intended her to be the purchaser herself. On those facts the judge held that she had been guilty of larceny by a trick and not of obtaining the goods by false pretences. He further held that the assured had the goods "in trust" within the meaning of the policy, and were "responsible" for their loss to the owners, from whom they had received them on appro. He also held that the case did not fall within the exception clause, for although, by reason of Ellison's preliminary transactions with the plaintiff she was a "customer" of his, she was not a "customer . . . . in respect of goods entrusted to her," that is to say that it was not qua customer that the necklets were delivered to her; and that, at all events, the language of the exception was sufficiently ambiguous to preclude the defendant from relying on it. He accordingly gave judgment for the plaintiff for 1450*l.*, the value of the necklets.

The defendant appealed.

van den Berg and *Gorman* for the appellant. The case falls within the exception clause of the policy, the loss having been caused by "dishonesty committed by . . . . a customer . . . . in respect of goods entrusted to her by the assured." First, Esmé Ellison was a "customer" of the plaintiff, she had had several previous dealings with him sufficient to justify that title being applied to her. The reason why the dishonesty of a customer is excepted from the risks insured against is that the customer, by reason of his dealings with the assured, is more or less well known to him, and, as the assured would presumably repose confidence in him, he would be likely to exercise a less strict supervision over him than he would over a stranger, and consequently would afford him greater facilities for committing an act of dishonesty. It is against that unusual risk that the underwriters refuse to insure. That this is the reason is shown by the fact that "customer" in the exception is associated with "servant, or traveller, or messenger in the exclusive employment of the assured," persons who would be well known to the assured, and the supervision over whom would consequently be proportionately lax. The learned judge below found as a fact that Esmé Ellison was a customer in the ordinary sense of the term, but he held that the necklaces were not entrusted to her qua customer, but as a mere agent or messenger for the purpose of showing them to others who might possibly become customers. That, however, is an unsubstantial distinction. His Lordship held that at all events there was sufficient ambiguity about the clause to preclude the underwriters from relying on it as a defence, on the principle formulated by Lord Macnaghten in *Elderslie Steamship Co.* v. *Borthwick* (1), that "an ambiguous document is no protection." But there is no ambiguity at all.

[He was stopped by the Court.]

Jowitt K.C. and *Melville* for the respondent. Even if it be assumed that Esmé Ellison was a customer of the plaintiff at the time that the necklaces were handed to her, they were not "entrusted" to her within the meaning of the

(1) [1905] A. C. 93, 96.

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policy, for at the moment that she received them she intended to steal them. The notion that goods can be entrusted to a thief, that is to say to a person who intends to commit larceny by the very act by which possession is obtained, involves a contradiction in terms; for it is an essential ingredient in an entrusting that the person delivering the chattel should intend the recipient to have the possession of it. The word "entrust" is a well-known term of art, and as used in this policy it must have the same meaning that it had in the old Factors Acts which dealt with "agreements in relation to goods, etc., entrusted to factors or agents," and "advances made to agents entrusted with goods." And it was held under those Acts that to constitute a factor entrusted with goods or the documents of title to goods, it was not enough that the factor should have obtained actual possession of the goods or document, but the principal must have consented to his obtaining it: see *Phillips* v. *Huth* (1); *Sheppard* v. *Union Bank of London* (2); and *Kingsford* v. *Merry*. (3) The word "entrusted" has dropped out of the present Factors Act 1889 (52 & 53 Vict. c. 45), there having been substituted in s. 2, sub-s. 1, the words "with the consent of the owner, in possession of goods," which it is contended mean exactly the same thing: see *Oppenheimer* v. *Frazer*. (4) Then that being the meaning of the word "entrusted" in the policy, the judge here found that Esmé Ellison was not in possession of the necklaces with the consent of the owner, for he found that she was guilty of larceny by a trick, and obtained the possession invito domino. For the purpose of construing a policy against "theft," which expression it is contended means larceny, it is necessary to look at the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50). That Act by s. 1 defines stealing as follows: "For the purposes of this Act—(1.) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently

(1) (1840) 6 M. & W. 572, 599.
(2) (1862) 7 H. & N. 661, 665.
(3) (1856) 1 H. & N. 503.
(4) [1907] 2 K. B. 50.

to deprive the owner thereof." And by sub-s. 2: "The expression 'takes' includes obtaining the possession (*a*) by any trick . . . . (*c*) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained." A person obtains possession "by a trick" within the meaning of (*a*) where he fraudulently by false representations induces the owner to give him the possession, the owner not intending either to pass the property to him or to confer upon him the power to pass the property to a third person: *Folkes* v. *King* (1) and *Heap* v. *Motorists' Advisory Agency*. (2) And here the judge has found that "Esmé Ellison received the necklets for a limited and specific purpose only; that she had no power to negotiate on the plaintiff's behalf or to transmit or pass any property in the necklets; that the plaintiff intended that his purchaser should be Mr. Van der Borgh, in the one case, and Commander Digby in the other case. He never intended that Esmé Ellison should be the purchaser or debtor." There were therefore here all the elements of obtaining possession by a trick. But there was also evidence justifying the conclusion that the woman obtained possession "under a mistake on the part of the owner" within the meaning of (*c*). The mistake there referred to includes a mistake as to the identity of the person obtaining the possession, as in *Hardman* v. *Booth* (3) and *Cundy* v. *Lindsay*. (4) Here she represented that she was Mr. Van der Borgh's wife. She was not, she was his mistress. And the distinction was most material, for the plaintiff's evidence was that he would certainly not have given her the possession of the necklaces if he had known that she was not Mrs. Van der Borgh. This reading of the exception clause does not deprive the word "theft" at the commencement of the clause of all meaning, for it would still cover the statutory offence of larceny by a bailee, so that even where an article was entrusted to a customer, if she had no intention to steal at the time of receipt of possession but subsequently misappropriated it after the

(1) [1923] 1 K. B. 282.
(2) [1923] 1 K. B. 577.
(3) (1863) 1 H. & C. 803.
(4) (1878) 3 App. Cas. 459.

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possession had been obtained the loss would fall within the words "loss by theft . . . . by a customer . . . . in respect of goods entrusted" to her.

van den Berg in reply. The plaintiff's construction of the word "entrusted" compels him to confine the meaning of the word "theft" to larceny by a bailee, an artificial limitation which would never suggest itself to the ordinary reader of the clause. The word "entrust" ought to be construed in its ordinary plain English sense, and not with reference to special Acts of Parliament. In its ordinary sense it means a voluntary delivery to a person in whom the owner has confidence, and it means nothing more. What the Court has to consider is the intention of the entruster, and his intention alone. It cannot be that the owner of a chattel cannot as a matter of law entrust it within the meaning of this policy to another person, however much he may desire to do so, merely because that other person intends to steal it. In *Folkes* v. *King* (1), where a mercantile agent, to whom a car had been delivered by the owner for sale, sold it and misappropriated the proceeds it became unnecessary, for the purpose of determining whether the purchaser had acquired a good title under the Factors Act, to consider whether proof of larceny by a trick affords an answer to that Act as excluding the consent of the owner, because there the agent, having authority to pass the property to a purchaser, had been guilty of obtaining the possession of the car by false pretences and had not committed larceny by a trick; but both Bankes and Scrutton L.JJ. expressed themselves strongly as of opinion that even if he had committed larceny by a trick it would have made no difference. Bankes L.J. (2) said: "I can see no reason why rules and principles of the criminal law are to be introduced for the purpose of putting a construction upon the language of the section. What the section refers to is the consent of the owner. To establish a consent it is no doubt necessary to consider what the state of mind of the owner of the goods was with reference to the possession of them by the mercantile agent. I fail

(1) [1923] 1 K. B. 282. (2) [1923] 1 K. B. 297.

to see how for this purpose, or for any purpose of applying the section, it can be material to look into the mind of the mercantile agent, any more than it would be to look into his pocket to ascertain whether he was in a position to pay for the goods." And Scrutton L.J. (1) expressed himself to the same effect: "I can understand that where by a trick there is error in the person there is no true consent and the Factors Act is excluded. But where there is agreement on the person and the true owner intends to give him possession, it does not seem to me that the fact that the person apparently agreeing to accept an agency really means to disregard the agency, and act for his own benefit, destroys the consent of the true owner under the Factors Act. . . . . I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there were only larceny by a bailee, or possession obtained by false pretences." Secondly, upon the evidence, Esmé Ellison was guilty not of larceny by a trick but of obtaining the necklaces by false pretences. The plaintiff at the time of handing her the two articles gave her a paper on which was written a description of each with the price at which she was to sell it, and ending with the words "net cash." She had told the plaintiff that she had in view two prospective purchasers, and the plaintiff in handing the necklaces to her with the paper above mentioned intended that if she could persuade those persons to buy at the prices named she might pass the property to them. There was nothing which required her to refer the matter back to the plaintiff before passing the property. And that this was so is made clear by the fact that upon her returning and telling the plaintiff that she had sold one of the necklaces to her husband he raised no objection but expressed himself as pleased with the result. Under these circumstances the case falls directly within the authority of *Folkes* v. *King* (2), and the question whether a chattel can in point of law be entrusted to an intending thief does not really arise. There was no mistake here as to the

(1) [1923] 1 K. B. 305. (2) [1923] 1 K. B. 282.

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identity of the person with whom the plaintiff intended to deal—namely, Mr. Van der Borgh, but only as to his particular relation to Esmé Ellison, a mistake which did not go to the root of the transaction.

Cur. adv. vult.

Mar. 25. BANKES L.J. In this case the plaintiff, a jeweller carrying on business at Exeter, sued the defendant, an underwriter at Lloyd's, to recover the value of certain articles of jewellery which he alleged had been stolen from him by a woman of the name of Ellison. The action is brought upon a Lloyd's policy of insurance underwritten by the defendant, covering fire, burglary, robbery, theft, accident from whatsoever cause or misadventure. For present purposes the material clauses of the policy are those which define the risk and the property covered by the policy, and the first exception. The material part of the clause defining the property is the part following the enumeration of the articles covered, which part reads as follows: "And all other articles usually kept in stock by jewellers the property of Messrs. John Ellett Lake & Son his/their own, in trust or on commission, or for which the assured is/are held to be responsible, while in his/their own custody, or in the custody of any person or persons to whom he/they may have entrusted the same on the conditions of sale or return, for valuation, or inspection, or for any other purpose whatsoever." The exception is in the following terms: "Loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the post) or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured his or their servants or agents unless such loss arise when the goods are deposited for safe custody by the assured his or their servants or agents with such broker or customer or broker's customer." The woman Ellison was convicted of stealing the articles in question. At the trial before McCardie J. the defendant contended that he was not liable upon the policy upon two grounds: (1.) That the offence

of which the woman Ellison was really guilty was that of obtaining the goods by false pretences, which was not covered by the policy. (2.) That the case fell within the exception, as the articles had been entrusted to a customer. To this the plaintiff replied that the offence of the woman Ellison was larceny by a trick which was covered by the policy, and, to the second contention, that she was not a customer. The learned judge decided the first point in the plaintiff's favour. I do not propose to discuss the facts from which the learned judge drew the inference that the true character of the woman's offence was larceny by a trick, or to go through the decisions which have been referred to, because I think that the learned judge was amply justified in arriving at his decision on this point, and that there is no ground for interfering with it. Upon the other question, whether the woman was a customer, the learned judge decided in the defendant's favour. I think that he was clearly right in so deciding.

The question upon which most stress was laid in this Court was that there was no entrusting of the articles to the woman, even assuming that she was a customer. We are told that the point was argued before the judge in the Court below, but he does not deal with it beyond saying that the word "entrust" is ambiguous in view of the context. I cannot under these circumstances think that the point was elaborated before him in the same way in which it has been elaborated in this Court. The ground upon which the learned judge decided against the defendant was that although the woman was a customer of the plaintiff the articles were not entrusted to her qua customer, that is to say in the capacity of an intending or possible purchaser. With all respect to the learned judge I am unable to agree with the construction which he placed upon the exception clause. In my opinion the clause is aimed at excluding from the risk undertaken by the insurer losses which may be likely to arise from the misplaced confidence of the assured in persons whom he employs, or with whom he does business. If therefore the assured in the present case entrusted the articles in question to the woman

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Ellison because she was his customer, the case, in my opinion, falls within the exception. On this point therefore I am unable to agree with the view taken by the learned judge.

It remains to consider the contention that upon the facts as found there was no entrusting of the articles to the woman Ellison. The point is put in this way. It is said that, once it is established that the woman Ellison in taking the articles was guilty of larceny by a trick, no question of entrusting the articles to her can arise, as the law regards the act of the woman under such circumstances as a taking of the articles without the consent of the owner: see the Larceny Act, 1916, s. 1, sub-ss. 1 and 2. This is no doubt true so far as the criminal law is concerned, and it is a very natural and proper provision to have made in order to prevent a thief from taking advantage of his own wrong, and relying upon a possession which he obtained unlawfully. Though true of the thief, it is obviously not universally true that no one can rely upon an entrusting where goods have been stolen by a trick; for instance, assume a case where an employer sought to dismiss his employee for gross carelessness in entrusting valuable articles to a thief, it would clearly be no answer for the employee to set up that the articles were stolen by a trick, and that there was therefore no question of entrusting the articles to any one. It is material also in dealing with this point to bear in mind the narrow, though very substantial, dividing line between larceny by a trick and larceny by a bailee. The law in reference to these classes of offence has recently undergone a change in form though not in substance. By s. 3 of the Larceny Act, 1861, a bailee of a chattel who fraudulently converted the same to his own use was declared to be guilty of larceny. This section was repealed by the Larceny Act, 1916, which, after defining the offence of stealing in s. 1, sub-s. 1, goes on in a proviso to that sub-section to enact that a person may be guilty of stealing a thing notwithstanding that he has lawful possession thereof if, being a bailee thereof, he fraudulently converts the same to his own use. Both classes of offence are therefore now included under the general description of

stealing. The narrowness of the dividing line may for present purposes be illustrated thus. The woman in question had a guilty mind at the moment she obtained possession of the articles. She was rightly, therefore, held guilty of larceny by a trick. If at the moment she received the articles she had honestly intended to show them to the persons whose names she gave to the assured, but the instant that she got into the street had changed her mind and decided to steal them, she would not have been guilty of larceny by a trick but of larceny as a bailee. In the one case, according to the contention of the appellant, the respondent could not be heard to say that he entrusted the goods to the woman, in the other he would be entitled to say so. In other words, the one case is not covered by the exception clause, the other case is covered. Is this the reasonable interpretation to be put upon the language of this policy? I think not. Both in the body of the policy and in the exception clause the words "theft" and "entrusted" occur. It is, I consider, plain that in the clause defining the risk the word "theft" is used in the most general sense as including all kinds of theft. Unless there were some very plain words limiting the meaning of the word "theft" in the exception clause to some particular description of theft, it would seem clear that the words should be read as having the same meaning in all parts of the policy. The fact that "dishonesty" is coupled with theft in the exception clause seems to me to point to a desire to add a something which would be entirely meaningless unless it was introduced with a view of excluding any technical construction of the word "theft."

I turn now to the word "entrusted." In its ordinary and natural meaning the expression includes a case of misplaced confidence, as well as a case of well justified confidence. It covers the case of a dealing with a dishonest man as well as that of a dealing with an honest one. It is only by associating the expression with particular descriptions of theft that it is possible to deprive the expression of its full and natural meaning. Once the conclusion is arrived at that the parties to this contract, when using the word

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"theft" in the exception clause, intended to include all classes of theft, the argument in favour of putting some exceptional or technical meaning on the expression "entrusted" loses its force. In the clause defining the property insured the expression "entrusted" is used in its widest sense as covering an entrusting to any person on condition of sale [or return, for valuation or inspection or for any other purpose. It appears to me that what the parties had in mind in this provision are the acts and intention of the assured apart altogether from any question of the intention of the person to whom the goods are entrusted. The same is, I think, true of the exception clause. In my opinion there is nothing in the language of the policy to lead to a conclusion favourable to the respondent's case on this point. On the contrary, I think the exception clause is directly aimed at misplaced confidence. The line of reasoning which led me and Scrutton L.J. to our conclusion in *Folkes* v. *King* (1) applies to the present case. Borrowing Scrutton L.J.'s language and applying it with the necessary variation to the present case, I do not think the parties to this contract had any intention of applying the artificial distinctions of the criminal law to a commercial transaction. I do not propose to deal with the decisions under the Factors Acts, because they appear to me to depend upon considerations which do not arise in reference to the construction of this particular contract. For the reasons I have given this appeal succeeds and must be allowed with costs, the judgment for the plaintiff must be set aside, and judgment entered for the defendant with costs.

WARRINGTON L.J. This is an action on a Lloyd's policy of insurance against loss or damage by amongst other things theft of or to a number of articles including pearls the property of the assured, or for which the assured are held to be responsible while in their own custody, or in the custody of any other person to whom they may have entrusted the

(1) [1923] 1 K. B. 282, 305.

same on conditions of sale or return, for valuation or inspection or for any other purpose whatsoever. The general terms of the policy are subject to the following exception: (1.) "Loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the post) or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured his or their servants or agents unless such loss arise when the goods are deposited for safe custody by the assured his or their servants or agents with such broker or customer or broker's customer."

The claim is in respect of two pearl necklaces, and it is not disputed that such claim is covered by the policy unless the circumstances bring the case within the exception of loss by theft or dishonesty committed by a customer in respect of goods entrusted to him by the assured. The alleged customer is one Esmé Ellison, a single woman living at the time in question with one Van der Borgh, and representing herself to be and believed by the plaintiff to be his wife. There was evidence that at or about the material times she purchased from the plaintiff in her own assumed name of Mrs. Van der Borgh, and paid for by her own cheques on an account in her name, certain articles of jewellery and plate. These cheques were duly honoured. The learned judge has found, and his finding is not questioned by the plaintiff, that Esmé Ellison was a customer of the plaintiff. He has however held, on the construction of the exception, that "it was meant to apply to a case where jewellery was delivered to a customer qua customer and for the purposes of that customer as such with respect, for example, to the purchase by that customer of goods delivered on sale or return to him or her," and that the goods in question were not entrusted to Esmé Ellison as a customer within the exception. With all respect to the learned judge, and having due regard to the well established principle of law that such a document is to be construed strictly, and that if an exception be ambiguous the general obligation of the insurer ought to prevail, I cannot agree with his conclusion. There is not

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in my opinion any ambiguity in the exception or any ground for limiting the meaning in the manner expressed by the learned judge. The word "customer" is not a term of art, but has a well-known connotation as describing a person who purchases from a tradesman goods in which he deals, and in my opinion, according to the true construction of the policy, if goods are entrusted by the shopkeeper to a person answering that description, as Esmé Ellison did, the case would be within the exception.

But there was raised before us a fresh point and one of greater difficulty. It was said that on the facts admitted and proved the crime of which, in respect of the goods in question, Esmé Ellison was guilty, was larceny by a trick, and that accordingly, having regard to the statutory definition of larceny, she took the goods without the consent of the owner, just as much as if she had, for example, taken them from the counter during his momentary absence, and could not be said to have been entrusted with them by the owner within the meaning of the policy. It was said on the other hand that this business document ought to be construed in reference to the actual facts, and not to an artificial view of them introduced into the law for the purpose of bringing within the crime of larceny certain cases not covered by the literal meaning of the expression "takes and carries away," and that so construed the expression covered the present case.

In order to decide between these opposing contentions it is now necessary to state shortly the material facts relating to the goods in question. Early in March, 1923, Van der Borgh and Esmé Ellison, passing as his wife, came to live at a well-known house at Dawlish, called Stonelands. About the same time Esmé Ellison, as Mrs. Van der Borgh, began the series of transactions already referred to which made her a customer of the plaintiff. On March 16, the plaintiff, at the request of Esmé Ellison and in reliance on a statement made by her, that her husband, meaning the said Van der Borgh, desired to give her as a birthday present a pearl necklet priced at 1000*l.* or thereabouts, delivered to her the

two pearl necklets in question, to be taken by her to Dawlish for inspection by her alleged husband. The two necklets are conveniently referred to as 121 and 139 respectively. On March 20 Esmé Ellison brought back necklet 139, stating to the plaintiff that her husband had selected necklet 121 as a birthday present for her, and giving certain reasons, which were untrue in fact, for his not having called to pay for it. She also on the same occasion told the plaintiff that "Commander Digby," a fictitious person, who she had previously stated was about to be married to her sister, had admired necklet 139, but that he could not pay the whole price in one sum. On March 23 or 24, Esmé Ellison again called on the plaintiff and made the following untrue statements: (*a*) that "Commander Digby" desired to purchase necklet 139; (*b*) that he was coming to Stonelands at Easter; and (*c*) desired to see the necklet 139 on March 27. On March 28 she again called and asked to be allowed to take away necklet 139 for the purpose of showing it to "Commander Digby." On April 4 she called and paid for one of the articles of jewellery she had previously bought, and said that April 10 would be a suitable day for her husband to call and pay for necklet 121. On the same day the plaintiff gave her the necklet 139 and allowed her to take it away for the purpose of showing it to "Commander Digby." On April 16 she called again and handed to the plaintiff her own cheque for 1350*l.*, of which 1100*l.* was to be in payment for necklet 121 and 250*l.* in part payment for necklet 139. This cheque was dishonoured, Esmé Ellison not having an account with the bank on which it was drawn. In the meantime she had sold both necklets, and neither of them has been recovered. On October 2, 1923, Esmé Ellison pleaded guilty to an indictment charging her with stealing the necklets. Several previous convictions for larceny and other similar offences were proved, and she was sentenced to sixteen months' imprisonment with hard labour. The learned judge came to the conclusion upon the above facts that the offence committed by Esmé Ellison was that of larceny by a trick, and not that of obtaining property under false pretences,

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as the plaintiff in delivering the goods to her did not intend to pass the property or to authorize her to do so. As to this distinction between the two offences, see *Folkes* v. *King* (1), and the cases there cited. With this conclusion I agree.

But upon the actual facts, apart from the artificial effect given to them for the purposes of the criminal law, I think it is clear that the plaintiff delivered the goods to Esmé Ellison of his own free will for the purpose of her showing them to an alleged intending purchaser. The question is whether they were entrusted to her by him within the meaning of the policy. Independently of authority I should come to the conclusion that a business document of this kind ought to be construed in reference to actual facts, and not in reference to an artificial and technical view of them invented for the purpose of preventing a thief from escaping the penalty of his wrongdoing by proving that he did not actually take the goods without the owner's consent. I think it cannot be supposed that the parties intended their relative position to depend upon technical and sometimes difficult distinctions between larceny and obtaining property by false pretences, or between different forms of larceny. Still less can it in my opinion properly depend on the result of an inquiry into the mind of the person to whom the goods were delivered —namely, whether he received them animo furandi or not. I think the use of the word "dishonesty," a word not necessarily importing a criminal offence, is some indication that the parties are not in this clause thinking of technicalities. On the whole, therefore, unless I am bound by authority to hold otherwise, I am of opinion that on the true construction of the policy, and in the events which have happened, the defendants are protected by the exception and the appeal ought to be allowed and judgment entered for them. Am I so bound? I think not. It is true that cases were decided under the old Factors Acts, that for the purposes of those Acts a factor could not be said to be "entrusted" with documents if he had obtained them by larceny by a trick:

(1) [1923] 1 K. B. 282.

see *Phillips* v. *Huth* (1), and in *Oppenheimer* v. *Frazer* (2) Fletcher Moulton L.J. expressed the view that "anything that negatives consent in the eye of the law appears to me to negative its existence for the purposes of s. 2 of the Factors Act, 1889." On the other hand, in *Folkes* v. *King* (3) both Bankes and Scrutton L.JJ. expressed the view, in accordance with the argument of Mr. Hamilton K.C., now Lord Sumner, in *Oppenheimer* v. *Frazer* (2), that, even for the purpose of the construction of the Factors Act, the Court, in determining whether goods are in the possession of a factor with the consent of the true owner, ought to have regard to the actual facts, and not to the rules and principles of the criminal law. Neither in *Oppenheimer* v. *Frazer* (2) nor in *Folkes* v. *King* (3) was it necessary to decide the point in question, and the observations of the several judges are strictly obiter, though in the latter case Scrutton L.J. preferred to rest his decision on the point rather than on the means whereby the factor in that case obtained possession. If I had to decide the point I should prefer to adopt the argument of the present Lord Sumner in *Oppenheimer* v. *Frazer* (2) and the judgments of Bankes and Scrutton L.JJ. in *Folkes* v. *King* (3) rather than the opposite view. But I think it is unnecessary so to do. It does not in my judgment follow that, because it may be unnecessary in construing an Act of Parliament to give a strict legal construction and effect to expressions used therein, it is right to do so in construing and giving effect to a business document such as that in question in the present case. I consider therefore that I am at liberty to give effect to the opinion that I have already expressed that this appeal ought to be allowed.

ATKIN L.J. The claim of the plaintiff is against the defendant, a Lloyd's underwriter, for a loss under an insurance policy covering, amongst other perils, loss by theft. The plaintiff, a jeweller at Exeter, claims in respect of the loss of two pearl necklaces, one of 121 pearls, the other of 139

(1) 6 M. & W. 572. (2) [1907] 2 K. B. 50.
(3) [1923] 1 K. B. 282.

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pearls, which he says were stolen from him by a woman named Ellison. The defendant relies upon an exception in the policy of "theft committed by any customer . . . . in respect of goods entrusted to them by the assured." He says that the necklaces were entrusted to Ellison, who was a customer. I need not recapitulate the facts. I agree with the other members of the Court that the learned judge took too narrow a view of the words "entrusted to a customer" by excluding a case where the goods are entrusted to a customer as a manager or agent, and not for the customer's own purposes, e.g., for purchase by the customer himself. I also agree that the learned judge was right in finding that this was a case of larceny by a trick. The only question that remains is whether these goods were, within the meaning of the policy, "entrusted" to Ellison. In my judgment the finding that these goods were stolen by Ellison in the circumstances of the case makes it impossible for the goods to have been entrusted to her by the true owner. Larceny by a trick is merely a form of stealing, and is common law larceny. Cases to that effect are to be found in the books at least as early as the eighteenth century. The circumstance that the true owner makes a delivery in fact to the thief does not prevent the transaction from being theft where the owner is tricked into making the delivery, and intends to deliver the possession and not to transfer the property, or the right to transfer the property, and the recipient has at the time the animus furandi. In such a case by common law there is a taking invito domino; by the Larceny Act, 1916, s. 1, a taking "without the consent of the owner." In the present case Ellison stole the respective necklaces on March 16 and April 4 in the plaintiff's shop the moment she obtained possession of them. She stole them just as completely as though she had secretly taken them off the counter and hidden them in her bag. In the words of the Larceny Act she took and carried them away without the consent of the owner. This is now accepted by the whole Court. She has indeed admitted the offence and been sentenced to imprisonment for that very offence. That at one and the same

time she could both take the goods without the consent of the true owner and be entrusted with the goods by the true owner is to my mind a logical absurdity which I do not find it necessary to admit into our law. It is not, I think, disputed that the word "entrust" implies a consensual act, a real consent on the part of the entruster. It is perhaps the most apt word, and the word most commonly used, to describe the creation of a bailment, a delivery of a chattel on trust to perform some act or service in respect of it. I cannot think it arguable that in the present case a bailment was created. If it were Ellison could justify her possession until the bailment was determined either by the bailor revoking his consent, or by her wrongful dealing with the chattel in breach of the terms of the bailment. But if she stole the goods she was from the first moment a trespasser. Larceny is a form of trespass; in other words the common law wrong of trespass is proved by proving a larcenous taking. This is not a technicality of the criminal law, but a principle as old as the common law, and governs civil rights and procedure as much as obligations and procedure in matters of crime. The truth is that the supposed consent in the physical delivery of the chattel to the thief is no consent where the circumstances constituting larceny by a trick exist, and is no consent whether you view the transaction in a criminal or a civil proceeding. Exactly the same result follows in other forms of larceny though there is a delivery in fact, e.g., an obtaining possession by intimidation, or under a mistake by the true owner known by the thief at the time. If the customer induced the jeweller at the revolver's point to hand over jewellery, so that there was delivery in fact, would it still be a technicality of the criminal law to say that there was no entrusting? or if the jeweller handed to the customer a diamond ornament in mistake for a plain gold ornament to the customer's knowledge, would the same result follow? But these are precisely the forms of larceny mentioned in the Larceny Act, s. 1, sub-s. 2 (*i*), (*b*), (*c*) following (*a*) "by any trick," and they appear to me to give rise to precisely the same considerations, and

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negative consent both in criminal and civil matters. Their origin is not statute but common law. They constitute a trespass, and in my judgment regulate civil as well as criminal legislation. The only authority for introducing into our law the anomaly that a man may be at the same time a thief who has taken goods "without the consent of the owner," and a person who is "in possession with the consent of the true owner," is to be found in the dicta of two members of the Court who decided the case of *Folkes* v. *King* (1), Bankes and Scrutton L.JJ. I need not say what respect I have for anything that falls from those two Lords Justices; but they both recognize in their judgments that their views were expressly rejected by previous members of the Court of Appeal in *Oppenheimer* v. *Frazer*. (2) In these circumstances I am free to form my own opinion, and am bound to say that I prefer the opinion of Lord Gorell, Lord Moulton, and Kennedy L.J., supported by the dictum of Lord Collins in *Cahn* v. *Pocketts Steam Packet Co.* (3) In other words, I think that even where a person is dealing with a mercantile agent in possession of goods or documents of title he still runs the risk of the mercantile agent having stolen the goods or documents of title, and that it makes no difference by what form of larceny the agent obtained the goods, whether secretly, or by a trick, or by intimidation, or by mistake, or by finding, if it can be said of him that he took them without the consent of the true owner so as to steal them. The person dealing with such a person clearly runs the risk of the first form of larceny; I should have thought also clearly of the last—larceny by finding. It seems to be admitted that he takes the risk of larceny by a trick which consists of deceit as to identity, as in *Cundy* v. *Lindsay*. (4) I think he takes the risk of all larceny in the taking, thereby excluding larceny by a bailee, and to hold the contrary, so far from mitigating artificial distinctions, is to create a new and unnecessary one, and to introduce a new-fangled anomaly into the law as to consent. I may perhaps venture

(1) [1923] 1 K. B. 282.
(2) [1907] 2 K. B. 50.
(3) [1899] 1 Q. B. 643, 659.
(4) 3 App. Cas. 459.

to add that I can see nothing artificial in the common law doctrine as to larceny by a trick which nullifies the supposed consent in a delivery made in the relevant circumstances. I do recognize an artificial distinction as to false pretences where the property is intended to pass; but it would be too long a task to discuss the history of this well established distinction and the grounds on which it may be supported in principle. It also occurs to me that if there is one sphere in which it would appear to be out of place to reject the distinctions of the common law it is in the construction of a policy of insurance the main object of which is to insure against loss by crimes.

I have arrived at the result negativing any entrusting without having regard to the early Factors Acts, and the significant change from the language of "entrusted" with goods or documents in the Acts of 1823, 1825, 1842 and 1877, to "in possession with consent" in the Act of 1889 and the Sale of Goods Act. But as consent is essential in either case, and here it has been found that there was no consent, I do not further discuss them or the cases or the Acts.

I think that the same result is arrived at by consideration of the words of the exception. "Theft . . . . committed by . . . . a customer in respect of goods entrusted to" her appears to me to convey two independent transactions, a customer of the specified description, i.e., entrusted, and a theft by such a customer, and not to be covered by a case where the theft is the entrusting. The words are given full value by the consideration that such a customer, after being entrusted, may commit theft—larceny by a bailee, as well as acts of dishonesty, e.g., illegal pawning. The words plainly do not include all larceny by a customer, for if the customer were to secretly purloin jewellery from the counter the theft would not be within the exception.

I may add, should it be necessary, that I have little doubt that the words are at least too ambiguous to protect the insurer who relies on them from the absolute liability imposed by the plain words of the recital and the promissory clauses.

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I hesitate to refer to this lest it should suggest that I personally really find the words ambiguous. I do not. I think that the appeal should be dismissed.

Appeal allowed.

Solicitors for the appellant: *Windybank, Samuell & Lawrence.*

Solicitors for the respondent: *Kenneth Brown, Baker & Baker, for Dunn & Baker, Exeter.*

J. F. C.

1925
Nov. 17.

MORGAN *v.* EVANS.

Mines—Coal Mine—Haulage—Mechanical Power—Prohibition against Persons riding—Sets or Trains of Tubs—Plural including Singular—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 43, *sub-s.* 2.

The Coal Mines Act, 1911, s. 43, sub-s. 2, provides that, subject to the exceptions therein given, "where the haulage is worked by gravity or mechanical power, no persons shall be allowed to ride on sets or trains of tubs."

Held that this sub-section does not merely prohibit the management of the colliery from allowing such riding, but is directed against any person riding in the manner forbidden, except in the named exceptional cases.

The words "sets or trains of tubs" as used in the above sub-section include a single tub.

Coltness Iron Co. v. *Baillie* [1922] 1 A. C. 170 distinguished.

CASE stated by justices for the county of Carmarthen.

An information was laid by the appellant against the respondent for that on January 23, 1925, at the parish of Clannon in Carmarthenshire, being an engine driver employed at the Great Mountain Colliery, where the haulage was worked by mechanical power, he did unlawfully ride on a tram contrary to the Coal Mines Act, 1911, s. 43, sub-s. 2.

The following statement of the facts proved or admitted at the hearing is taken from the case stated:—

(1.) The Great Mountain Colliery was a colliery in which s. 43, sub-s. 2, of the Coal Mines Act, 1911, applied; the haulage was worked by mechanical power, a steam engine,

drum, and wire rope. The respondent did not come within the exceptions (*a*), (*b*) or (*c*) to the sub-section.

(2.) The respondent was the driver of a stationary engine below ground which worked the haulage on an incline leading to the main slant. He was at work on January 23, 1925, and appeared to have been taken ill shortly before the close of his shift. He requested David John Hughes, an assistant collier, to let him down in a tram. Hughes agreed, and took charge of the engine. A single empty tram was at the time attached to the rope. Three men then got on board the tram; Evan Davies, a collier, sat inside it, and the respondent and William D. Williams, a hitcher, sat each on a buffer. Hughes then started the tram down, but lost control, with the result that the tram ran wild to the bottom of the incline, where Evan Davies was killed and the respondent and Williams were injured. The tram was not being used in connection with the haulage of coal, but solely for the purpose of conveying the three men down the incline.

(3.) The respondent had no power or authority with respect to the tram; his duties were exclusively confined to the driving of the engine.

(4.) Notices were posted in the colliery prohibiting riding.

On the part of the appellant it was contended that the sub-section was a definite prohibition against any person riding, and that it made it illegal to ride even if the journey was made by only one tram; that a single tram must be within the mischief of the section, as a person could ride only upon one tram; and that by the Interpretation Act, 1889, words in the plural included the singular.

On the part of the respondent it was contended that being a penal enactment the section must be construed strictly, and that the sub-section was a direction to the management of the colliery not to allow riding, and was not a general prohibition against riding. The sub-section was as follows: "Where the haulage is worked by gravity or mechanical power, no person shall be allowed to ride on sets or trains of tubs. . . . ." It was further contended that the sub-section only applied to sets or trains of tubs and could not mean a

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single tub, and that the effect of the Interpretation Act, 1889, would be to make it apply to one set or train as the singular of sets or trains, but not to a single tram.

The following cases were cited to the justices: *Coltness Iron Co.* v. *Baillie* (1); *Costello* v. *Robert Addie & Sons' Collieries* (2); *M'Intosh* v. *Arden Coal Co.* (3); and *Whiddert* v. *Chislet Colliery.* (4) The justices also referred to *Williams* v. *Cleeves Western Valleys Anthracite Collieries.* (5)

The justices by a majority dismissed the information, and in stating this case for the opinion of the High Court gave the following reasons for their decision:—

(1.) In view of the judgment of Lord Dunedin in the case of the *Coltness Iron Co.* v. *Baillie* (6), and particularly the concluding paragraphs thereof, in which his Lordship says that if a universal prohibition were intended it would be easy to frame the order in such terms as "No one shall approach," we did not feel justified in holding that a universal prohibition against riding was provided for by s. 43, sub-s. 2. We note that the form suggested by his Lordship is used in s. 43, sub-s. 1; in s. 35, and in many of the General Regulations. (2.) It appeared to us that upon a strict construction of the sub-section it could not be held to refer to a single tram. The whole of the sub-section deals with associations of tubs in sets or trains and never with a single tram. It appears to be framed to guard against the dangers which may arise from the union of a number of tubs into a train, like the danger of being crushed between the component tubs. We were of opinion that the effect of the Interpretation Act, 1889, would not make the provision apply to a single tram. The singular number is used in s. 43, sub-s. 2 (*b*): "A set or train of tubs."

The question upon which the opinion of the Court was desired was whether the justices upon the above statement of facts came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

(1) [1922] 1 A. C. 170.
(2) [1922] 1 A. C. 164.
(3) (1924) 93 L. J. (P. C.) 264.
(4) (1920) 89 L. J. (K. B.) 1209.
(5) (1924) 17 B. W. C. C. 97.
(6) [1922] 1 A. C. 170.

Cave K.C. and *Daniel Johns* for the appellant.

G. Clark Williams for the respondent.

The arguments sufficiently appear from the case stated and from the judgments.

LORD HEWART C.J. In this case a majority of the justices in my opinion were wrong in point of law. The first question is: What, in s. 43, sub-s. 2, is meant by the words "No person shall be allowed to ride on sets or trains of tubs"? Is that a prohibition directed only to the management against allowing, or does it also include the individual employee who is not, by reason of this section, to be allowed to ride in the manner described? Great stress has been laid upon the case of *Coltness Iron Co.* v. *Baillie.* (1) Indeed, it is clear that it was the judgment in that case which caused the justices to take the view that they did take of the meaning of those words. It is to be observed, however, that the words in *Coltness Iron Co.* v. *Baillie* (1) were very different words. The language there was clearly particular and not general. Para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, provided that "If a shot misses fire the person firing the shot shall not approach or allow any one to approach the shothole" until after a given interval. The words themselves show that the person referred to is the person firing the shot. He has two duties: he is not to approach until after a given interval himself, and he is not to allow any one to approach. A particular sentence was cited from the speech of Lord Dunedin, but that sentence should be read closely in connection with the sentence which goes before it. I will read the two sentences: "The framers of the order have thought it sufficient to put an embargo on the firer of the shot himself, and to entrust to him the duty of keeping others away. This being so, I do not think that we, as judges, are entitled to spell out of the terms of the order a further restriction which may be truly according to the spirit, but is certainly not in any way expressed in the letter." The language in that case, as it

(1) [1922] 1 A. C. 170, 176.

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seems to me, supplies a contrast to the language in this case. In order that the two phrases might be comparable one would have had to find in *Coltness Iron Co.* v. *Baillie* (1) such a provision as: "No person shall be allowed to approach." But those are not the words. The words are: "If a shot misses fire the person firing the shot shall not approach or allow any one to approach." Here the words are that in certain circumstances—namely, "Where the haulage is worked by gravity or mechanical power, no person shall be allowed to ride on sets or trains of tubs except," and the exceptions are enumerated. Exception (*b*) is this: "Except men being conveyed, with the written permission of the manager or under-manager, to or from their work at the commencement or end of their employment (including any person in charge of a set or train of tubs on which men are being so conveyed)." If the respondent is right in contending that s. 43, sub-s. 2, means: "The management shall not allow any person," one has to read the words of the sub-section and that exception in this way: "The management shall not allow any person to ride on sets or trains of tubs except men being conveyed, with the written permission of the manager or under-manager, to or from their work," which, to some extent, seems like saying the same thing twice over. Similar considerations apply if one looks at exceptions (*a*) and (*c*). It is quite true that the form of s. 43, sub-s. 1, is different. The form there is: "No person, other than an official of the mine, ... shall . . . . travel on foot on any haulage road," and so on. Where a person is travelling on foot he is master of his locomotion, but where a person is going to ride on sets or trains of tubs another person may or may not be involved. A compendious expression: "No person shall be allowed to ride on sets or trains of tubs," is therefore convenient as applying to both. I think, therefore, that the justices were wrong in thinking that they were bound, in their construction of these words, by the construction of the quite different words referred to in the case of *Coltness Iron Co.* v. *Baillie* (1), and that the contention was right which

(1) [1922] 1 A. C. 170.

urged that s. 43, sub-s. 2, contained a definite prohibition against any person riding on sets or trains of tubs where the haulage was worked by gravity or mechanical power, except in the named exceptional cases.

Reference has been made to two Workmen's Compensation cases: *Williams* v. *Cleeves Western Valleys Anthracite Collieries* (1), and *Whiddert* v. *Chislet Colliery*. (2) Those cases do not appear to throw much light upon this matter, one of them because the point taken here was not taken in the argument in the Court of Appeal, and the other because the words are again quite different from the words with which we are concerned.

The second point was that here the respondent was upon a single empty tram or tub, and it was said that the plural words in s. 43, sub-s. 2, were limited to the plural, and, notwithstanding the provisions of the Interpretation Act, 1889, could not be construed as including the singular, or, at any rate, this singular. That they must include some singular is common ground. The words of the sub-section are: "No person shall be allowed to ride on sets or trains of tubs except," and so on. Nobody contends that, although a person is not to be allowed to ride on sets or trains of tubs, he may ride on a set or train of tubs. Indeed, the first exception immediately shows that no such meaning as that is involved, because it goes on to speak of "a person travelling on a set or train." But it is said: "Although sets or trains of tubs may mean a set or a train of tubs it cannot mean a tub." But where the haulage is worked by gravity or mechanical power, where, that is to say, the opening words of sub-s. 2 apply, there does not seem to be any difficulty in saying that that mechanical power, coupled with a train or tub, is sufficient for this purpose to make a set or a train of tubs, just as one may say, without any violence of language, that upon a railway a locomotive engine plus a carriage amounts to a train. True, it is a very small train, but it is a train. It is conceded that if there were two tubs there would be no difficulty in speaking of a train or set of tubs. I think, for the purposes of this section,

(1) 17 B. W. C. C. 97. (2) 89 L. J. (K. B.) 1209.

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there is no difficulty in speaking of one tub as amounting to a set or a train of tubs, "where the haulage is worked by gravity or mechanical power," because it is not a thing considered by itself, but is a thing which is part of a larger whole. Indeed one sees that one of the exceptions here is the case of a person "travelling on a set or train for the purpose of detaching or attaching tubs from or to the haulage rope, if that set or train is not proceeding at a higher speed than three miles per hour." It might well be that such a person, spoken of as a person "detaching or attaching tubs," might be detaching or attaching a tub, and having detached a tub he might find that there was but one tub left.

For these reasons I am satisfied that in this section the plural does include the singular, and that the justices made an error in point of law under both heads, and that in this case there ought to have been, as there was not, a conviction of the respondent for a breach of s. 43, sub-s. 2, of the statute.

I should like to add that, when I look further on—namely, to s. 43, sub-s. 2, it is quite clear that the statute contemplates some sets or trains which consist of a very small number of tubs, because sub-s. 3 contains special provisions as to "places where sets or trains consisting of three or more tubs are coupled or uncoupled."

AVORY J. Both of the points which commended themselves to the majority of the magistrates here are, I think, well worthy of argument, particularly in view of the contrast which is drawn between sub-s. 1 and sub-s. 2 of s. 43. But I have come to the conclusion on both points that the judgment which has just been delivered by my Lord gives the correct interpretation of this statute. Looking at the exceptions to sub-s. 2, I think that the prohibition is intended to apply both to the person who rides and to anybody who permits him so to ride.

With regard to the second point, looking at the mischief which is clearly contemplated in, and provided for by this section as a whole, it seems to me clear that the same mischief

arises from a man riding or being allowed to ride on a single tub as if he is riding upon a set or a train of tubs. For those reasons I agree that the magistrates should have convicted.

SANKEY J. I agree. The only point that falls for our determination here is: What is the correct construction of a few words in the Coal Mines Act, 1911, s. 43, sub-s. 2? Those words are: "Where the haulage is worked by gravity or mechanical power no person shall be allowed to ride on sets or trains of tubs except" in certain specified instances. It has been pointed out to us on behalf of the respondent that that is a penal section, and that therefore we ought to construe it strictly. But I cannot forget the arrangement of the Coal Mines Act, 1911. Part I. of the Act down to s. 28 deals with "Management": Part II. of the Act contains "Provisions as to safety," and personally I should never desire to be a party in any way to the relaxing or the whittling away of those "Provisions as to safety," which are necessary for the protection of all persons employed in the mine. The first provisions as to safety deal with ventilation, the next with safety lamps, the next with shafts and winding, and then we get a fasciculus of sections which deal with travelling roads and haulage, in which the section under discussion finds a place. Sect. 43 seems to me to deal, as indeed the marginal note says, with "Provisions as to travelling on haulage roads," and first of all, in sub-s. 1 it deals with travelling on foot, and in the next sub-s. it deals with travelling or riding on trams. Sub-s. 2 is not an absolute prohibition, because there are certain cases where it is permissible to ride upon trams, especially under sub-s. 2 (*b*); there, certain men may be allowed by the management to ride on the trams, and they are men being conveyed, with the written permission of the manager or under-manager, to or from their work at the commencement or end of their employment. In order to construe what the draftsman had in his mind, it is most important to remember s. 43, sub-s. 2 (*b*). I paraphrase the sub-section in this way: "No person other than those allowed by the management—see (*b*)—shall be allowed

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to ride on the sets or trains of tubs." The argument for the respondent would involve the insertion of the words in the wrong place. One would have to read the section thus: "Where the haulage is worked by gravity or mechanical power no person shall be allowed by the management to ride on sets or trains of tubs." But that does not take into consideration sub-s. 2 (*b*); provision has to be made for the case where some men are allowed to ride by the management, and for that reason the section is drafted in this somewhat peculiar way. I am therefore of opinion that the magistrates were wrong on the first point.

With regard to the next point, which is a highly technical one, I agree with my Lord and Avory J. that riding on one tram or one tub is just as much within the mischief of the section as riding on a train of two or three tubs or trams. One tram may break away and be dashed to the bottom, or a man standing on one tram is just as likely, where the roof is low, to hurt his head against the roof as a man standing on one tram which is part of a train of trams. I think, on a technical reading of the section, that the argument for the respondent on this point is an attractive one; but I am not prepared to differ from my Lord and Avory J. I am satisfied that the magistrates were wrong on this point also.

Solicitors for appellant: *Bell, Brodrick & Gray, for Kensholes and Prosser, Aberdare.*

Solicitors for respondent: *J. T. Lewis & Woods, for Randell, Saunders & Randell, Llanelly.*

F. P. F.

AKTIESELSKABET REIDAR *v.* ARCOS, LIMITED.

1926
April 22, 23.

[1924. A. 2321.]

Shipping—Charterparty—Stipulation for "full and complete cargo"—Detention of Ship—Failure to load full Cargo—Claim for dead Freight—Demurrage—"Full and complete cargo."

A charterparty provided that a ship should load a "full and complete cargo" and proceed to a British port, and provision was made for loading at a stipulated rate and for payment of demurrage for delay. The charterers failed to load at the stipulated rate, and consequently the ship started too late to arrive in England in time to enable her to enter lawfully a British port with a full and complete summer cargo, but only to carry thereto a full and complete winter cargo which was considerably smaller. In an action by the shipowners for dead freight for the difference between the summer and winter cargoes, the defendants contended that the cargo was a full and complete cargo, and, further, if it was not, that the damages were included in the amount payable on demurrage:—

Held, that "full and complete cargo" meant that which would be such if the charterers had complied with their obligation to load at the agreed rate—i.e., a summer cargo.

Held, further, that the provision as to demurrage had reference only to damages caused by the detention of the ship, and did not prevent the shipowners from claiming other damages for failure to load a full and complete cargo.

ACTION tried before Greer J.

The plaintiffs, Aktieselskabet Reidar, were the owners of the Norwegian steamship *Sagatind*, and the defendants, Arcos, Ld., carried on business in England as (inter alia) timber importers. By a charterparty dated May 26, 1923, as amended on September 19, 1923, the defendants chartered the said steamer to proceed to Archangel and there load a full and complete cargo of timber for carriage to (inter alia) a port on the west coast of England. Clause 1 of the charterparty defined the quantity of timber which was to constitute a full and complete cargo, and the rate of freight was 3*l.* 10*s.* per standard. Demurrage was to be at the rate of 25*l.* per day, provision being made for a fixed rate of loading.

The *Sagatind* was delayed from various causes through no fault of her own, and did not arrive at Archangel until October 3, 1923. Had the rate of loading provided by the

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charterparty been maintained, there was plenty of time for her to have loaded a full summer cargo and to have arrived in England without incurring any penalty under s. 10 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48) (which forbids a ship arriving at a port in the United Kingdom from a foreign port after October 31 from carrying a deck load of timber). The full and complete summer load of the *Sagatind* was 850 standards. The rate of loading provided for was not maintained, and instead of finishing her loading by October 17 she finished too late to arrive at Manchester (the port to which she was ordered) before November 1. In anticipation of this she only took on board a winter load of 544 standards, a deficiency of 306 standards. The plaintiffs claimed dead freight on the 306 standards at the rate of 3*l.* 10*s.* per standard, less certain credits—namely, 988*l.* 7*s.*, and alternatively five days' demurrage at 25*l.* per day—namely, 125*l.*

Sir R. Aske for the plaintiffs. The defendants are liable for dead freight for the difference between the full and complete cargo they had contracted to supply and the cargo they did in fact supply. It is true that, in the events that happened, if they had supplied a full and complete cargo within the meaning of the contract, i.e., a summer cargo, they would have violated the provisions of s. 10 of the Merchant Shipping Act, 1906. But their inability to carry a full and complete cargo to England without violating the law was occasioned by their own fault in failing to load at the stipulated rate; they are, in fact, setting up their own wrong as a defence. The defendants will contend that the provision in the charter-party for payment of demurrage is a provision for agreed damages caused by delay in loading, and therefore covers this claim. But demurrage is only agreed damages for the detention of the ship, and has nothing to do with other breaches of the contract. This failure to load a complete cargo is such a breach, and could have existed, even though the ship had not been detained, and therefore no demurrage payable. And similarly, the plaintiffs would have been

entitled to demurrage if the ship had been delayed, even though she had loaded a full and complete cargo.

Raeburn K.C. and *D. B. Somervell* for the defendants. The plaintiffs allege that the defendants have broken their contract to load a full and complete cargo, but the charterparty contains no definition of what a full and complete cargo is. The test to apply in ascertaining what is a full and complete cargo is not what would be such a cargo on the proper date of arrival, because the charterers are entitled to keep the ship beyond the lay days on demurrage. The damage in this case is met by the demurrage, for the shipowners in fixing the rate must be taken to have included all classes of damage and not merely damages for detention. They could have provided specially for this class of damage had they wished to do so. The utmost that can be said against the defendants is that they failed to load within a certain number of days, and for that demurrage provides.

GREER J. This case involves a question of the interpretation of a charterparty, and is not without its difficulties, but on the whole I have come to the conclusion that the plaintiffs are entitled to succeed in their claim for what is called dead freight, which in legal terminology is damages for failure to load a full and complete cargo.

A vessel called the *Sagatind* was chartered on May 26, 1923, by the defendants to go to a port called Mesane in Norway. It was contemplated, as appears by the charterparty, that she would get there some time in July, in the summer, and by the charterparty when she got there she was to load a full and complete cargo of wood goods of the description mentioned in the charterparty. Being loaded with a full and complete cargo she was "therewith to proceed to London or East Coast of the United Kingdom or West Coast of England or Scotland (including Bristol Channel) or English Channel or North France or Holland or Belgium or French bay port, not south of Bordeaux, in charterers' option, one port only, as ordered on signing bill of lading or at Lodingen." The vessel was detained through no fault of

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her own, and as a result it was agreed that instead of going to Mesane she should go to Archangel, the object being to get her to a port which would not be closed by ice as early as the port mentioned in the charterparty. All the other terms of the charterparty continued to be applicable to the substituted voyage and the substituted loading at Archangel. The clause relating to demurrage is cl. 3 of the charterparty, which says: "Steamship to be reckoned as a 4 hatch steamship and the cargo to be loaded at the rate of 80 standards per weather working day for deals and battens and 60 standards for other goods, steamship having 4 winches." It goes on, after providing for discharge: "Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 25*l.* per day, and pro rata for any part thereof." It seems to me, apart from authority, that the charterers' undertaking is to load at the agreed rate, and if the charterer does not load at that agreed rate it is a proper description of his conduct to say that he has broken a term of the contract, but at the same time he has agreed as to the damages that are to be payable for that breach. I think the effect of the cases is, that a breach of that kind is not one that goes to the root of the contract, and, therefore, the shipowner is not entitled to say: "As you have not loaded within the agreed time I will not wait." But the charterer is entitled to say: "This clause was put in for my benefit as well as yours; it measures the damages I have to pay; it does not entitle you to go away; I am entitled to go on loading the ship subject to my liability to pay the agreed damages for the detention of the ship." Whatever may be said in other cases where the lay days are specifically mentioned as so many, in my judgment with a contract of this sort it is not accurate to say, as Lord Trayner is reported as saying in *Lilly & Co.* v. *Stevenson & Co.* (1), that "days stipulated for by the merchant, on demurrage, are just lay-days, but lay-days that have to be paid for." It is not necessary to express any opinion whether Lord Trayner's words accurately state the law in cases where a specific number of

(1) (1895) 22 R. 278, 286.

lay-days are mentioned in the contract. It is enough to say that, in my judgment, they have no application to cases like the present in which the undertaking of the charterers is to load at a specific rate.

What happened was this. The vessel arrived at Archangel on October 3. She arrived in plenty of time, if the rate of loading provided by the charterparty had been complied with, to have loaded her cargo and to have sailed with a full summer cargo to England without suffering any penalty under s. 10 of the Merchant Shipping Act, 1906, for having loaded more than the permissible amount of cargo. She ought to have started to load on October 4, when notice of readiness was given. I do not know when she started to load, but she completed loading 544 standards by October 23. If she had loaded at the rate provided for by the contract she would have put on board a full summer cargo by October 17, and if ordered to London, could have discharged without being liable to any penalty or without being liable to a charge of having broken the laws of this country. She was in fact ordered to go to Manchester, that is to say a port in the United Kingdom and a port to which the provisions of the Merchant Shipping Act would apply. I think I am entitled to interpret the charterparty as if that port had been mentioned in the charterparty, because it became the chartered port of discharge when the vessel was ordered to go there. What are the obligations of the charterer? He has, as the plaintiffs' counsel has argued, two duties to perform in relation to the loading of the cargo. One is that he has to load a full and complete cargo, and the second is that he has to load at the agreed rate. What is the meaning of a full and complete cargo under the charterparty of this vessel, chartered to load at Archangel and discharge in Manchester? In my judgment it means that which would be a full and complete cargo if the charterer complied with his obligation to load at the agreed rate. That means that it would in this case have been a complete summer cargo and would have consisted of, I think, 850 standards. It is said that all that happened in this case was that there was a delay in loading,

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and that the contract has completely provided for the amount that is to be paid by the charterer for that delay in loading, and attention is called to the provision about the 25*l.* per day demurrage. In my judgment, though I have had some hesitation about it during the course of the argument, Sir Robert Aske is right in saying that that merely provides for damages at so much per day for the detention of the ship. But that does not prevent the plaintiff shipowner from saying also, in a case where there has been detention of the ship, that there has been a breach of the primary obligation to provide a full and complete cargo. As I say, a full and complete cargo in my judgment means that which would be a full and complete cargo for the vessel if loaded in accordance with the terms of the charterparty.

For these reasons I think that the plaintiffs are right in their contention, and are entitled to recover the amount which they seek to recover for dead freight.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Botterell & Roche.*

Solicitors for defendants : *Wynne-Baxter & Keeble.*

W. L. L. B.

SOUTHERN RAILWAY COMPANY *v.* GOSPORT CORPORATION AND EDDISON STEAM ROLLING COMPANY, LIMITED.

1926
March 24, 25, 26, 29, 30.

[1924. S. 4801.]

Bridge—Bridge crossing Railway—Damage to Bridge by Road Locomotive —Liability for Repair—Locomotive Act, 1861 (24 & 25 *Vict. c.* 70), *s.* 7.

Sect. 7 of the Locomotive Act, 1861, provides that where a road crosses a railway by means of a bridge, and the bridge is damaged by a locomotive passing over it, the damage shall be forthwith repaired "by and at the expense of the owner or owners or the person or persons having the charge of such locomotive at the time of the happening of such damage; and all such owner and owners, person and persons having the charge of such locomotive as aforesaid, shall also be liable, both jointly and severally, to reimburse and make good" all losses consequential on such damage by reason of obstruction, interruption or delay:—

Held, that in respect of actual damage to a bridge, as distinguished from consequential loss, the liability to repair is imposed upon the owner of the locomotive if he has the charge of it at the material time, but if some person other than the owner has the charge of it, the liability is upon that person. The section does not make the owner and such other person jointly and severally liable for that damage.

Action tried by Greer J.

The plaintiffs, who were the owners of a bridge which carried a public road over their railway in Hampshire, sued the defendants to recover the sum of 321*l.* 4*s.* 10*d.*, which they had had to expend in partially reconstructing the bridge which had been damaged owing, as they alleged, to the joint negligence of the defendants. In the alternative, the plaintiffs alleged that the defendants were jointly and severally liable for the damage by virtue of s. 7 of the Locomotive Act, 1861. (1)

(1) Locomotive Act, 1861, s. 7: "Where any turnpike or other roads, upon which locomotives are or hereafter may be used, pass . . . . over or across any . . . . railway by means of any bridge . . . . and such bridge . . . . or any of the walls, buttresses, or supports thereof, shall be damaged by reason of any locomotive . . . . passing over the same . . . . such damage shall be forthwith repaired . . . . by and at the expense of the owner or owners or the person or persons having the charge of such locomotive at the time of the happening of such damage; and all such owner and owners, person and persons having the charge of such locomotive as aforesaid, shall also be liable, both jointly and severally, to reimburse and make good, as well to

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In May, 1924, the road crossing the bridge in question required to be repaired, and the defendant corporation, upon whom by agreement between them and the plaintiffs rested the obligation of doing this, were carrying out the repairs by means of a steam roller belonging to the defendant company who had let it on hire, with their driver, to the defendant corporation when the damage complained of by the plaintiffs was done.

Each of the defendants denied that they had been negligent and denied, also, that any liability was imposed upon them by virtue of s. 7 of the Locomotive Act, 1861.

On the evidence Greer J. held that the rolling of the roadway on the bridge at the material time was done in a negligent manner; that the driver of the steam roller was for the time being the servant of the defendant corporation, who alone were therefore liable for that negligence; that the damage done to the bridge at the time in question was due to that negligence; that the bridge was doomed in any case through having been weakened by the passing over it for some time of heavy vehicular traffic; and that the plaintiffs would have had to expend a considerable sum upon it before long, probably in six months. In those circumstances he assessed the damages which the plaintiffs were entitled to recover from the defendant corporation at 10*l.*

Schiller K.C. and *The Hon. S. O. Henn Collins* for the plaintiffs. The plaintiffs are entitled to judgment against the defendant company as well as against the defendant corporation by virtue of s. 7 of the Locomotive Act, 1861. That section imposes liability upon the owner of the locomotive and the person having the charge of it at the material time jointly and severally. This is clearly borne out by the provision of the section which in terms makes the owner of the locomotive and the person having the charge

> the proprietors, undertakers, directors . . . . and other persons interested in or having the charge of any such . . . . railway . . . . as to all persons . . . . using, or who but for such obstruction, interruption, or delay would have . . . . used the same, all losses and expenses which they or any of them may sustain or incur by reason of any such obstruction, interruption, or delay. . . . ."

of it at the material time liable, jointly and severally, for consequential damage. It would be strange in view of that to hold that the same liability was not imposed for the actual damage to the bridge.

Rayner Goddard K.C. and *Trapnell* for the defendant corporation.

Holman Gregory K.C. and *J. L. Pratt* for the defendant company. Sect. 7 of the Locomotive Act, 1861, makes a clear distinction between liability for the actual damage and consequential damage.

[They were stopped.]

GREER J. [having stated the facts and held that the defendant corporation were liable in damages continued :] I have now to consider whether the defendant company are also liable by virtue of s. 7 of the Locomotive Act, 1861, although I have absolved them from liability for the negligent way in which the rolling was being done. Sect. 7 says that where a bridge crossing a railway is damaged by reason of a locomotive passing over it, the damage is to be forthwith repaired " by and at the expense of the owner or owners or the person or persons having the charge of such locomotive at the time of the happening of such damage." Do these words mean that both the owner and the person having at the time the charge of the locomotive are under the obligation to repair the damage ? Or do they mean that the obligation is only upon the person actually in charge of the locomotive at the time—the owner, if he is in charge, and the other person, if the owner is not in charge ? It seems to me that the latter is the proper interpretation. It would produce an extraordinary state of things if, when a bridge was damaged and when it was imperative that it should be immediately repaired and so made safe, it should be left to two persons to decide which of them should do the work, the damage meanwhile remaining unrepaired. In the words I have quoted from the section the damage to the bridge is to be forthwith repaired " by and at the expense of the owner or owners or "—not " and "—" the person or persons having the charge of such locomotive." If the person using the

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locomotive at the material time is the owner he has to repair the damage; if, on the other hand, some person other than the owner has the charge of the locomotive, then he has to repair the damage. It is true that the section goes on to deal with consequential damage arising to the railway company by reason of obstruction, interruption or delay, caused to them by the damage, and it says that for such consequential damage the "owner and owners, person and persons having the charge of such locomotive as aforesaid, shall also be liable, both jointly and severally." The argument based upon this difference of language is double-edged. On the one hand it appears to help the plaintiffs, for it seems odd that the obligation to repair the actual damage should be alternative—to be determined by the fact who had charge of the locomotive at the material time—and not by choice, whereas the liability in respect of the consequential damage is joint and several. The Legislature, however, when it intended to impose a joint and several liability, knew how to do this by the use of express language. On the whole, I think the construction I have indicated is correct, and as in this case the corporation, and not the company, were in charge of the locomotive, the obligation to repair rested upon the corporation and not upon the company. The section gives the railway company, the owners of the bridge, if the damage to it is not repaired forthwith, the right to say that they have suffered damage because of the non-repair, and to recover upon that ground; but I have held that the defendant corporation were negligent in fact, and that their negligence caused damage to the bridge. There will be judgment against the corporation for 10*l*.

Judgment for plaintiffs against defendant corporation.

Solicitor for plaintiffs: *W. Bishop.*

Solicitors for defendant corporation: *Kenneth Brown, Baker, Baker, for Edgar J. Bechervaise, Portsmouth.*

Solicitors for defendant company: *King, Wigg & Brightman, for Andrews, Barrett & Wilkinson, Weymouth.*

J. S. H.

NICHOLSON *v.* ENGLAND.

Dec. 11. 1925.

Limitation of Action—Tenancy at Will—Tenancy from Year to Year—Determination of statutory Period without Assertion or Acknowledgment of Reversioner's Title—Subsequent Payment in respect of Rent—Right of Action by Reversioner—Continuance or Reviver of Tenancy—Extinction of Title—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 2, 7, 8, 34.

Where the title of a reversioner to land subject either to a tenancy at will within s. 7 of the Real Property Limitation Act, 1833, or to a tenancy from year to year within s. 8 of that Act, has been extinguished by reason of his having received no acknowledgment thereof by payment of rent or otherwise during the statutory period from the expiration of a year after the commencement of the tenancy, that title cannot be revived by a subsequent payment in respect of rent.

Semble that in s. 8 the words defining the second alternative time for the accrual of the reversioner's right of action—namely, "the last time when any rent payable in respect of such tenancy shall have been received"—do not apply to a tenancy in respect of which, since the determination of the first year thereof, the statutory period has expired without any acknowledgment of the reversioner's title by payment of rent or otherwise.

Bunting v. *Sargent* (1879) 13 Ch. D. 330 not followed.

Sanders v. *Sanders* (1881) 19 Ch. D. 373 followed.

Appeal from Banbury County Court.

Mr. George Horsfield Nicholson was a colliery accountant residing at Rotherham in Yorkshire. In January, 1909, during the lifetime of his first wife, Mary Nicholson, their daughter Jessie Nicholson, now Jessie England, the present defendant, who then contemplated being married, told him that a house known as Edgehill House at Ratley in Warwickshire was for sale and suggested that he should buy it for her to live in when married. He and his said wife being of opinion that the house would be convenient for them to retire to eventually, he accordingly bought it. He borrowed 700*l.* from his bank in order to pay the price, and the purchase was completed on April 13, 1909. On April 24, 1909, the defendant was married to Mr. G. H. England and they, with the consent of her father, took up their residence at the house. Shortly before the marriage Mr. Nicholson handed the defendant 60*l.* for the purchase of furniture, and shortly

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after the marriage he handed her a further 20*l*. On October 16, 1921, Mr. Nicholson's first wife died. In June, 1922, the defendant took a sum of 100*l*. to her father, asking him to keep it towards what she owed him, and he kept it accordingly. On February 10, 1923, Mr. Nicholson married his second wife, Sarah Elizabeth Nicholson, the present plaintiff. On November 7, 1924, an indenture was executed by Mr. Nicholson and the plaintiff, by which he purported to grant convey and assign to the plaintiff, by way of gift, the said house with its garden and appurtenances in fee simple, and a sum of 138*l*. arrears of rent owing to him in respect thereof absolutely.

In March, 1925, the plaintiff brought the present action against the defendant in the county court for possession of the house and arrears of rent thereof. The plaintiff in her particulars of claim alleged (inter alia) that she was entitled to possession of the house, rent due from the defendant not having been paid; that the house was let in April, 1909, under an oral agreement made by the defendant's late mother on behalf of Mr. Nicholson and by his assent with the defendant to the effect that the defendant should occupy the house until Mr. Nicholson required it for his own use and should meanwhile pay a rent of 17*l*. per annum; that the said 138*l*. arrears of rent were arrived at as follows—namely, 255*l*., being fifteen years' rent from April, 1919, to April, 1925, less 117*l*. paid on account made up of the following sums paid on the following dates—namely, 8*l*. 10*s*. in August, 1911, 8*l*. 10*s*. on March 27, 1913, and 100*l*. in June, 1922; and, alternatively, that the plaintiff claimed the like sums from the defendant for her use and occupation of the house. The defendant gave notice of her intention to rely upon the defence that the plaintiff's claim was barred by the Statutes of Limitation.

On April 22, 1925, the action was tried in the county court.

On behalf of the plaintiff evidence was given by Mr. Nicholson and by the plaintiff herself. Mr. Nicholson said that he had no idea of going to Ratley until the defendant asked him to buy the house for her to live in when married; that his first wife and he arranged that he should buy the house

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for them to retire to, and for the defendant to occupy in the meantime; that he paid 675*l.* for the house; that in order to do so he borrowed 700*l.* from his bank at 5 per cent. per annum, or in all 35*l.* per annum; that the arrangement with the defendant was that she should pay a rent of 17*l.* a year for the house, but that she should not be pressed for it; that he personally had never asked the defendant to pay the rent or received any rent from her; that he told his first wife that she might keep any rent she got from the house, and delegated her to collect the rent; that the rent of 17*l.* a year was arrived at as being about half of the yearly interest on the money borrowed to buy the house, the defendant not being charged with the rest of the latter sum as rent because she was caretaking the house for her parents; that while his first wife lived he went to that house once a year when he got his holiday; that an account book, which was produced, and which contained two pencil entries—namely, "August 1911. J. paid 8*l.* 10*s.*," and "March 27, 1913. J. paid 8*l.* 10*s.*," had belonged to his first wife, that the entries were in her handwriting, and that the "J." in these entries stood for the defendant; that when the defendant brought to him the 100*l.* note and asked him to keep it towards what she owed him, she did not owe him anything but rent; that the sums of 60*l.* and 20*l.* which he handed to the defendant were gifts and not loans; that he did not say to the defendant that she should live in the house as long as she pleased or to Mr. England that he should not trouble him for any rent. The plaintiff said that after the house had been given and conveyed to her she saw the defendant; that the defendant said she had never paid or agreed to pay any rent, that she was living in the house without paying rent because of some agreement with her father, and that her (defendant's) husband thought they were living there on her father's generosity; and that the defendant said she gave her father the 100*l.* because she thought she ought to pay him something, as she had lived so many years in the house without paying rent.

On behalf of the defendant evidence was given by the

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defendant and by Mr. England, her husband. The defendant said that on April 17, 1909, she returned to her father's house, and that her father told her that he should charge her no rent for Edgehill House; that she never made any agreement with her mother about the rent; that she never paid or lent her mother a sum of 8*l.* 10*s.* in 1911 or 1913; that she did not think the pencil writing in the account book was her mother's; that she considered that the sums of 60*l.* and 20*l.* which she got from her father were loans and not gifts; that she gave her father the 100*l.* note in repayment of these sums and of 20*l.* interest thereon; that she had no need for a gift of money; that though she never lent her mother 8*l.* 10*s.*, she lent her other sums; that if she paid her mother 8*l.* 10*s.* she could not say why she did so; and that her father told her he would charge no rent and she never paid or meant to pay any rent. Mr. England said that the defendant and he had never paid any rent for the house or been asked to do so; and that in May, 1909, Mr. Nicholson told him that he would not be troubled for any rent.

The county court judge accepted the evidence of Mr. Nicholson as to the arrangements under which the defendant was let into possession of Edgehill House, and believed his story against that of the defendant. He found that each of the two sums of 60*l.* and 20*l.* received by the defendant from her father was a gift and not a loan, and that the pencil entries in the account book were in the handwriting of the defendant's mother. He found that in June, 1922, when the defendant asked her father to keep the 100*l.* towards what she owed him, she owed him nothing except for unpaid rent of the said house. He found that apart from the alleged payments of 8*l.* 10*s.* each in 1911 and 1913 no payment of rent was made by the defendant between April 24, 1909, when she went into possession of the house and the beginning of June, 1922, when she paid her father the 100*l.* If neither of the payments of 8*l.* 10*s.* was on account of rent then he thought that the defendant obtained a title under the Real Property Limitation Act, 1833, after

April 24, 1922, and that the payment of 100*l.* a month later could not revive Mr. Nicholson's title : *Sanders* v. *Sanders*. (1) Although he found that the pencil entries were in the handwriting of the defendant's mother, who had been delegated by her husband to receive any rent the defendant might pay, he did not think that on the evidence it was reasonably open to him to find that they established the payment of any sum on account of rent due from the defendant to her father, though he should have been glad to have seen his way so to find, as he thought that all the merits of the case were with Mr. Nicholson, whose daughter had taken advantage of his kindness. He, therefore, gave judgment for the defendant with costs.

The plaintiff gave notice of appeal.

Foà (*Bramley* with him) for the plaintiff. The action is not barred by the Statutes of Limitation.

Even if the tenancy was a tenancy at will the action is not barred. On that view the case comes under s. 7 of the Real Property Limitation Act, 1833, which provides that the reversioner's right to bring the action shall be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy. Under that Act as amended by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, the action must be brought within a period of twelve years next after the time when the right to bring it first accrued, that is within thirteen years from the commencement of the tenancy. An acknowledgment by the tenant of the landlord's title by payment of rent or otherwise during the currency of the period interrupts the period and begins a new period. In the present case the tenancy began on April 24, 1909, and the action was brought on March 3, 1925, the interval between these dates thus being longer than the statutory period. During that interval, however, on two occasions—namely, in August, 1911, and on March 27, 1913, the defendant paid to her mother sums of 8*l.* 10*s.*, and the plaintiff alleges that from the facts found regarding these

(1) 19 Ch. D. 373.

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sums the inference may be drawn that these sums were paid by the defendant as instalments of rent of the house. Though the county court judge declined to draw that inference, this Court has power to draw it under the Rules of the Supreme Court, Order LIX., r. 7, and it is submitted that it ought to do so. If the sum paid on the latter of these dates was paid for rent then it prevented the statutory period from elapsing before the action was brought. Even though it cannot be proved by direct evidence that the defendant paid rent during the statutory period commencing at the end of the first year of the tenancy, yet the county court judge has found as a fact that after the determination of that period, namely in June, 1922, the defendant made a payment of 100*l.* for arrears of rent of the house, and that payment raises a presumption that she paid rent previously during the period, and in particular that the payments of 8*l.* 10*s.* were payments of rent: *Sanders* v. *Sanders* (1), and therefore that the period had not expired before the action.

Further, even if there was in fact no payment of rent during the statutory period commencing at the end of the first year of the tenancy, the payment of the 100*l.* as rent after the determination of that period had the effect of reviving the tenancy and commencing a new statutory period which was still current when the action was brought: *Bunting* v. *Sargent.* (2)

The true inference, however, from the circumstances in which this tenancy was formed is not that it was a tenancy at will but that it was a tenancy from year to year: *In re Threlfall.* (3) If the tenancy was a tenancy from year to year, then it came under s. 8 of the Act of 1833, which provides that the landlord's right of action is to be deemed to have accrued at the determination of the first year of the tenancy, or at the last time when rent shall have been received by the landlord, which shall last happen. If in this case the landlord's right be deemed to have first accrued at the first mentioned of these two alternative times, then the case is

(1) 19 Ch. D. 373. (2) 13 Ch. D. 330.
(3) (1880) 16 Ch. D. 274.

very similar to what it would have been if the tenancy had been a tenancy at will, and the arguments already advanced are equally applicable for the purpose of showing that the statutory period had not elapsed before the action was brought. The plaintiff, however, is entitled to say that under the section the landlord's right first accrues at the second alternative time—namely, the last time when any rent payable in respect of the tenancy has been received, and that the statutory period only begins to run at that time. Here the last time when rent payable under the tenancy was received was in June, 1922, when the defendant paid the 100*l.* to her father for rent. The payment of that sum marked the commencement of the period of limitation, or if the tenancy had previously been extinguished it revived the tenancy and began a new period of limitation: *Bunting* v. *Sargent* (1), and in either event the period of limitation was still current at the time when the action was brought.

If there was here no tenancy between the parties, the plaintiff might have difficulty in showing that the action was not barred by limitation, but it is submitted that the view that there was no tenancy cannot be sustained. If the tenancy was a mere service tenancy it would seem that the statutes of limitation could not operate against the plaintiff: *Peakin* v. *Peakin*. (2)

G. B. Hurst K.C. (*Rand* with him) for the defendant. The action is statute barred.

The tenancy was a tenancy at will and not a tenancy from year to year. The arrangement between the defendant and her father created a tenancy of so loose and informal a character that it could be terminated on either side at any time, and it therefore came within the legal definition of a tenancy at will—namely, a tenancy which endures at the will of the parties: Foà on Landlord and Tenant, 6th ed., p. 2, and nothing ever occurred to alter its character. Being a tenancy at will, it came under s. 7 of the Real Property Limitation Act, 1833, and the reversioner's right to bring an action accrued at the end of a year after the commencement

(1) 13 Ch. D. 330. (2) [1895] 2 I. R. 359.

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of the tenancy, and the period of limitation is twelve years from that time. The evidence is not sufficient to prove and the county court judge has not found that the defendant made any acknowledgment of the reversioner's title by payment of rent or otherwise during that period, and therefore at the determination of that period the right and title of the then reversioner to the land was extinguished: *Sanders* v. *Sanders* (1) and *Day* v. *Day* (2), and he had no interest in the land which he could assign to the plaintiff.

Even if the tenancy was a tenancy from year to year, the reversioner's right of action and indeed his right and title to the land was extinguished. In that case s. 8 of the Act of 1833 applies, under which the reversioner's right of action first accrues either at the determination of the first year of the tenancy or at the last time when rent payable in respect of the tenancy shall have been received, which shall last happen. If no rent is paid the statutory period runs from the end of the first year of the tenancy, but if the reversioner's right is kept alive by payments of rent, then the period runs from the last of these payments. The words which occur towards the end of the section "rent payable in respect of such tenancy" must mean rent payable under a subsisting tenancy and not in respect of a tenancy which has ended. That section should be read in relation to s. 34, which provides that at the determination of the period limited to the reversioner for bringing an action his right and title to the land shall be extinguished. When these two sections are read together they mean that if no rent is paid in the meantime then at the determination of the statutory period commencing at the end of the first year of the tenancy the right and title of the reversioner are extinguished. In view of these considerations, the latter part of s. 8 cannot be construed as meaning that the reversioner's right of action is to be deemed to have first accrued at the last payment of rent however long after the commencement of the tenancy or after any previous acknowledgment of the reversioner's title, and that in every case the tenancy is still subsisting

(1) 19 Ch. D. 373. (2) (1871) L. R. 3 P. C. 751.

when that payment is made or if previously extinguished is revived by it, and that the period of limitation only begins to run at the time of that payment. That construction of the section might no doubt appear to be supported by the case of *Bunting* v. *Sargent* (1), where Jessel M.R. seems to have said that the reversioner's right of action is not extinguished if rent is paid within the statutory period before the action, or if extinguished that it can be revived by a payment of rent within that period. That case, however, cannot be regarded as sound in law. It has not been followed or approved in any subsequent case; it is not in accordance with the more recent authorities, including *Sanders* v. *Sanders* (2); *In re Hobbs* (3); and other cases; and it is treated as erroneous in Darby & Bosanquet on Statutes of Limitation, 2nd ed., p. 362, and Carson on Real Property Statutes, 2nd ed., pp. 180n., 181. The later authorities show that the lessor's title may be extinguished before a payment of rent is made in respect of the tenancy, and that in that case the payment will not revive the tenancy. It follows that in the present case the tenancy having commenced on April 24, 1909, and no rent having been paid till June, 1922, when the defendant paid the 100*l*., that payment could not prevent the tenancy from being extinguished on April 24, 1922, or revive it after it had been extinguished.

Foà in reply. The tenancy is not a tenancy at will under s. 7 of the Act of 1833, but a tenancy from year to year under s. 8. In the latter section two alternative times are specified for the first accrual of the landlord's right of action, the second of these being "the last time when any rent payable in respect of such tenancy shall have been received." These words are general and unqualified and cannot be construed as the defendant seeks to construe them except by adding to them some such words as "provided that since the commencement of the tenancy thirteen years have not elapsed without payment of rent," but there is no warrant for adding such words. The authority of *Bunting* v. *Sargent* (1) has

(1) 13 Ch. D. 330. (2) 19 Ch. D. 373.
(3) (1887) 36 Ch. D. 553.

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not been impaired by any subsequent case. That case is treated as sound in law in Halsbury's Laws of England, vol. xix., p. 127n.

SANKEY J. This is an appeal from the judgment of the learned judge of the Banbury County Court in favour of the defendant in an action in which the plaintiff is a Mrs. Sarah Elizabeth Nicholson and the defendant a Mrs. Jessie England. The plaintiff brought the action for possession of a certain dwelling-house and premises at Ratley in Warwickshire, and for 138*l.* the balance of rent said to be owing in respect thereof. The defendant relied upon the Statutes of Limitation. The plaintiff, in reply, said that the operation of the statutes was excluded by certain payments made by the defendant on account of rent. The county court judge held that the defence was well founded and gave judgment for the defendant, and from that judgment the plaintiff now appeals to this Court.

The facts are shortly as follows: The plaintiff is the second wife of a Mr. G. H. Nicholson, a gentleman now seventy-one years of age, and the defendant is his daughter by his first wife. Mr. Nicholson said in the course of his evidence, which was accepted by the county court judge, that during the lifetime of his first wife he was engaged as a colliery accountant in Yorkshire, that he and his wife had no idea of coming to Ratley till the defendant thought of getting married, that she then told him that the house in question was for sale and wanted him to buy it for her to live in, that he talked the matter over with his wife and she thought it would be a nice place for them to retire to when he gave up business, and that it was arranged that he should buy the house for them to retire to eventually and for the defendant to occupy in the meantime. He also said that he bought the house, that on April 4, 1909, the defendant was married to a Mr. England and went into occupation of the house, that the arrangement was that she should pay a rent of 17*l.* a year but that she should not be pressed for it, and that he told his first wife, the mother of the defendant, that she

might keep any rent she got for the house, and delegated her to collect the rent, and he then described how the 17*l.* a year was arrived at. That state of things continued till October, 1921, when the defendant's mother died. In February, 1923, Mr. Nicholson married his second wife, the plaintiff in the action, and on November 7, 1924, he assigned to her the house and the rent alleged to be then due from the defendant. The plaintiff asked the defendant to pay rent, and thereupon disputes unfortunately arose between them. Eventually the plaintiff brought this action against the defendant.

The defendant says that the plaintiff's title and right to possession and rent are statute barred. She alleges that by the Real Property Limitation Act, 1833, as subsequently amended, if there has been no receipt of rent or acknowledgment for thirteen years from the commencement of the tenancy, the landlord's title is extinguished, that in this case the tenancy, of whatever kind it was, began on April 24, 1909, so that the period of thirteen years would have expired on April 24, 1922, that the defendant never did pay any rent or make any acknowledgment during that period, and consequently that the plaintiff's title ceased on the latter date.

To that the plaintiff makes this reply. He says that on two occasions—namely, in August, 1911, and on March 27, 1913—the defendant paid a sum of 8*l.* 10*s.* on account of rent. It is obvious that the first of these payments could be of no avail to prevent the statute from running, but it is said that the second of these payments had that effect. The plaintiff further says that besides paying these sums the defendant in June, 1922, paid a sum of 100*l.* to her father as rent, and though the defendant disputed the statement that that sum was paid as rent, the county court judge has found that it was so paid. The defendant says as to the sum of 8*l.* 10*s.* that it was not stated in express words and that it cannot be inferred that it was paid as rent or as an acknowledgment of title, and as to the 100*l.* that it was paid too late, as the title to the premises had then been extinguished. In this unfortunate family dispute the defendant's father and

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she herself both gave evidence, and the county court judge found that while the defendant was not telling the truth, her father was doing so. These are the facts. Before discussing the law, I will state what appear to me to be the issues which are raised upon these facts.

The first question seems to me to be what was the nature of the tenancy? I may say at once that I dismiss the point that there was no tenancy at all, as that cannot be argued again in this Court. Was the tenancy a tenancy at will or a tenancy from year to year? It is necessary to deal with this question because counsel for the plaintiff invites us to say that the law is different in the cases of these two forms of tenancy with regard to the effect of an acknowledgment in preventing the determination of the tenancy or reviving it after it has been determined. I propose to state what sort of a tenancy this was in my opinion and to give judgment on the footing that it was a tenancy of that sort, though I will also give an alternative judgment. I have already referred to the evidence given by Mr. Nicholson as to the constitution of the tenancy and accepted by the county court judge. In my view the arrangement which Mr. Nicholson described created a tenancy at will and not a tenancy from year to year.

The defendant says that if the tenancy is a tenancy at will it comes under s. 7 of the Act of 1833, and that by the provisions of that Act as amended it has been extinguished by the lapse of a period of over thirteen years without payment of rent or acknowledgment of title.

I now come to the first fact on which the plaintiff relies to take the case out of the statutes—namely, the payment on March 27, 1913, by the defendant to her mother of the sum of 8*l.* 10*s.*, which was exactly equal in amount to a half-year's rent of the house. In my view the question whether the payment of that sum was a payment of rent which would take the case out of the statute is a question of fact. Mr. Foà says that here all the facts have been found which are required to justify the inference that the payment was a payment of rent, that this Court is entitled

to draw inferences of fact, and that it ought to draw the inference that this payment was a payment of rent. He says that the county court judge would have liked to draw that inference, but thought that he was not entitled to do so. I do not read his judgment as meaning that he thought that there was any impediment in law to his holding that the payment was a payment of rent, but as meaning that he did not think that the evidence was sufficient to prove that the payment was on account of rent. The conclusion at which he arrived was a finding of fact, which cannot be disturbed.

Another fact on which the plaintiff relies is the payment by the defendant to her father in June, 1922, of a sum of 100*l.* on account of rent. I have said that in my opinion the tenancy was a tenancy at will. If that is so then s. 7 of the Act of 1833 applied to it, and, in the absence of any payment of rent or acknowledgment in the meantime, it was extinguished after thirteen years—namely, on April 24, 1922. The plaintiff says that the payment of the 100*l.* as rent some six weeks later had the effect of reviving the tenancy at will, which had been extinguished. I think that the case of *Sanders* v. *Sanders* (1) is conclusive to show that it had not that effect. I need not state all the facts of that case. It was tried to a great extent upon certain admissions between the parties which are set out in the report of the case. (2) It is sufficient to say that in that case Jessel M.R. said: "This case is singularly circumstanced. It is an appeal from a decision of Vice-Chancellor Malins, who appears to have decided that where a tenant in common has gained an adverse title to another share of the property under the Statute of Limitations, a complete title which extinguishes any other, he can by payment of rent or by subsequent acknowledgment restore the title which has been extinguished. There appears to have been some authority in support of that conclusion and some against it, but I must express my dissent from so much of his judgment as affirms that proposition. As I said in *In re Alison* (3), when a title has been

(1) 19 Ch. D. 373. (2) Ibid. 375.
(3) (1879) 11 Ch. D. 284.

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extinguished by the statute, no mere acknowledgment by the person who has acquired under the statute as good a title as if a conveyance had been made to him can restore the old title." (1) It is thus clear that in the present case the subsequent payment by the defendant of the 100*l.* as rent could not revive a tenancy which was dead and gone.

In regard to that payment of 100*l.* for arrears of rent, Mr. Foà said that he was entitled to rely upon another part of the judgment in *Sanders* v. *Sanders* (2) which showed that where rent was regularly paid subsequently to the expiration of the statutory period that payment was evidence on which it could be found that a similar payment had been made previously and that the tenancy had not been extinguished, but did in fact exist. That point cannot arise here. The facts in *Sanders* v. *Sanders* (2) were very different from those in the present case. In this case I do not think that the county court judge could have found that because the 100*l.* was paid on account of rent subsequently to the expiry of the statutory period, it should be inferred that the rent was paid before the expiry of that period. The mere fact that a sum of 100*l.* was paid subsequently tends to show that the rent had not been paid previously.

Assuming that the tenancy was a tenancy at will, I think that these conclusions would dispose of the case.

I will consider, however, what the position would be if the tenancy was a tenancy from year to year. Mr. Foà says that in that case a different section of the Act of 1833 must be considered. He says that while s. 7 applies to a tenancy at will, s. 8 applies to a tenancy from year to year, and that the latter section contains provisions which do not occur in the former. He says that though it may be that in the case of a tenancy at will the landlord's right and title are extinguished at the determination of the period of thirteen years from the commencement of the tenancy, and that, as decided in *Sanders* v. *Sanders* (2), the subsequent payment of rent will not revive it; yet when one passes on to consider a tenancy from year to year to which s. 8 applies, one finds

(1) 19 Ch. D. 379. (2) 19 Ch. D. 373.

that the landlord's right is not necessarily extinguished at the determination of that period, or, if then extinguished, that the subsequent payment of rent will revive it, and that the case of *Bunting* v. *Sargent* (1) shows that that is so. Mr. Hurst on behalf of the defendant says that *Bunting* v. *Sargent* (1) has not been followed or acted upon in any subsequent case and that it was in effect wrongly decided. The reasoning on which the decision in that case is based is set out in the judgment, which was that of Sir George Jessel M.R. sitting alone and was not a considered one. In his judgment the learned judge discussed the law and said that in the case of a tenancy from year to year the reversioner's right is not extinguished if rent is paid within the statutory period before the bringing of the action, or if extinguished that there can be a revival of it by such a payment of rent as has occurred here. Referring to s. 8 he said: "There are then two periods mentioned when the right of the reversioner can first accrue: if no rent is paid then it accrues at the end of the first year or other period; if rent is paid then it accrues at the last time when any rent shall have been received. Therefore the plaintiff is right in saying that he has only to prove a payment within twenty years of the commencement of the action. In this case the tenants pay rent within five years; how then can they plead the statute? The construction contended for would lead to this absurd result: a tenant might pay no rent for twenty years, and then in the twenty-first year he might pay it, and then turn round and say he was the owner in fee simple of the land." (2) The question for this Court is whether it ought to follow that case. As a common law lawyer I hesitate to express any disagreement with it. I think, however, with great respect, that it ought not to be followed. It seems to me that one of the chief sections of the Act of 1833 to be considered in this connection is s. 34. which provides that: "At the determination of the period limited by this Act to any person for . . . . bringing any writ of quare impedit or other action or suit, the right and title of such person to the

(1) 13 Ch. D. 330. (2) 13 Ch. D. 334.

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land, rent, or advowson for the recovery whereof such . . . . action, or suit respectively might have been made or brought within such period, shall be extinguished." The effect of that section would seem to be that as soon as the statutory period has determined without any payment of rent or acknowledgment an end is put to the tenancy. The section is not limited to the case of a tenancy at will, but provides in perfectly general terms that when the period has expired the right and title shall be extinguished. Having regard to that provision I do not think there can be a continuance or reviver of the tenancy after that period by a subsequent payment of rent.

Sir G. Jessel M.R. in his judgment relied upon the words at the end of s. 8: "the right of the person entitled . . . . to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)." It is said that under that provision, although a statutory period has expired, yet, if rent payable in respect of the tenancy has been subsequently received by the landlord, he can still bring his action. That construction of the section appears to me to be wrong, because when the section speaks of "rent payable in respect of such tenancy" it must be taken to be referring to rent payable under an existing tenancy and not under a tenancy which has been extinguished, and the word "received" must mean received under an existing tenancy. Where, since the determination of the first year of the tenancy a statutory period has expired without any acknowledgment of the reversioner's title by payment of rent or otherwise the tenancy has gone, and there is none existing at the time when the subsequent rent is paid or received.

For these reasons I think that the decision in *Bunting* v. *Sargent* (1) should not be followed. I may say also that it does not seem to have been followed or relied upon in any subsequent action. The remarks of Lush L.J. in *Sanders*

(1) 13 Ch. D. 330.

v. *Sanders* (1) show that he was not following *Bunting* v. *Sargent.* (2) He said: "If it had been proved that for twenty years before 1864 no payment or acknowledgments had been made by Thomas Sanders the son to John Sanders or persons claiming under him, then I think that no acknowledgment after 1864 would give them a title, and that no payment of rent after that year would give them a title, unless it was continued for such a period as to give a new statutory title." (3) That statement is opposed to the decision in *Bunting* v. *Sargent.* (2) Moreover, I cannot but think that the observations of Jessel M.R. himself in *Sanders* v. *Sanders* (4) seem to show that he had it in mind that *Bunting* v. *Sargent* (2) might not have been rightly decided, because he said in reference to the proposition that subsequent payment of rent or acknowledgment can restore a title which has been extinguished, "there appears to have been some authority in support of that conclusion and some against it." I need not refer to writers of text-books who have disagreed with *Bunting* v. *Sargent.* (2) The case is discussed in Darby & Bosanquet on Statutes of Limitation, 2nd ed., p. 362, where it is submitted that the view of Jessel M.R. cannot be supported. In my opinion this appeal should be dismissed.

MACKINNON J. I agree. It seems to me that the decision in *Bunting* v. *Sargent* (2) cannot be reconciled with the reasoning of *Sanders* v. *Sanders* (1), or indeed with the provisions of the Real Property Limitation Act, 1833, itself.

Appeal dismissed.

Solicitors for plaintiff, appellant: *Sharpe, Pritchard & Co., for Bramley & Coombe, Sheffield.*

Solicitors for defendant, respondent: *Field, Roscoe & Co., for Whitehorns, Banbury.*

(1) 19 Ch. D. 373.
(2) 13 Ch. D. 330.
(3) 19 Ch. D. 373, 382.
(4) 19 Ch. D. 373, 379. See ante, p. 105.

J. R.

Referred to. ENGLISH AND SCOTTISH CASE. [1948] A. C. 405

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March 1, 2.

LIVERPOOL CORN TRADE ASSOCIATION, LIMITED *v.* MONKS (H.M. INSPECTOR OF TAXES).

Income Tax—Association incorporated as Company—Profit or Gain—Carrying on Trade—Transactions of Association with Members—Members' Entrance Fees and Subscriptions—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case* 1.

An association, formed with the object of promoting the interests of the corn trade, was incorporated in 1897 under the Companies Acts as a company with a share capital of 60,000*l.*, upon which the Association has power to declare dividends. The Association provided a corn exchange, market, newsroom and facilities for carrying on business. Membership of the Association was confined to persons engaged in the corn trade, and every member was required to be a shareholder in the company. Members on joining the Association had to pay an entrance fee. The Association also charged the members and other persons making use of the market facilities, commercial accommodation and information which the Association provided, subscriptions which varied in amount according to the use made of such facilities, the subscriptions payable by members being less than those payable by outsiders. The bulk of the receipts of the Association were derived from the entrance fees and subscriptions paid by members. The Association, having been assessed to income tax upon its profits, contended that it did not carry on a trade, and that so far as its transactions with its members were concerned it was a mutual association, and that the entrance fees and subscriptions paid by members should be disregarded in computing the Association's assessable profits :—

Held, that the Association was not a mutual association whose transactions with its members were incapable of producing a profit; that it carried on a trade the profits of which were assessable to income tax; and that the entrance fees and subscriptions paid by members ought to be included in the Association's receipts for the purpose of computing its profits assessable to income tax.

New York Life Insurance Co. v. *Styles* (1889) 14 App. Cas. 381 considered and distinguished.

CASE stated by the Special Commissioners of Income Tax.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 22, 1924, for the purposes of hearing appeals, the Liverpool Corn Trade Association, Ld. (hereinafter called "the Association"), appealed against an assessment to income tax (Sch. D) in the sum of 7500*l.* for the year ending April 5, 1922, made upon the Association by the Additional Commissioners

for the Liverpool Division of the county of Lancaster under the provisions of the Income Tax Acts. The Association was assessed under Case 1 of Sch. D on the excess of its receipts over its expenditure.

2. The Association was registered under the Companies Acts on April 7, 1897, with a capital of 60,000*l.*, divided into 400 shares of 150*l.* each, of which 375 shares have been issued and are fully paid. A copy of its memorandum and articles of association marked "A" was annexed to and formed part of this case.

3. The objects of the Association as set out in the memorandum of association were (inter alia):—

(B) To promote or oppose legislative and other measures calculated to affect the corn trade generally, and for those purposes to petition Parliament and take such other steps and proceedings as may be expedient, and to define, make and maintain uniformity and expediency in the rules, regulations, usages and customs of the said trade, and to establish just and equitable principles therein.

(C) To adjust and settle disputes between persons engaged in the said trade by establishing a tribunal of reference for the amicable adjustments of such disputes.

(E) To provide, regulate and maintain a suitable building, exchange, market and room for the purposes of the corn trade in Liverpool.

(Q) To establish and maintain a clearing house for the clearance of contracts or periodical settlement of contracts, and for facilitating payments between persons engaged in the corn trade.

4. By art. 4 of the articles of the Association, membership of the Association is confined to persons engaged as principals in the corn trade and persons having full authority to conduct the business of a principal engaged in the corn trade. (It is practically a necessity for any cornbroker or other person trading in grain in Liverpool to become a member.)

By art. 6 every elected member shall acquire one share

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of the Association within one month of his election, unless the directors by resolution agree to extend his time.

By art. 7 any person becoming a member is required to pay an entrance fee of such an amount as the directors may prescribe. (The entrance fee varies in amount from 200*l.*, which is the sum payable by the son of an old member or by certain other classes of persons who have been connected over a period of years with the Association, to 1000*l.*, which is the sum payable by persons who do not come within the 200*l.* category and are generally persons who do not carry on business in Liverpool.)

By art. 9 no member can hold more than one share in addition to the share acquired on admission to membership, and he may in the circumstances therein set out be required to transfer his additional share for the sum of 250*l.* if a new member is unable to acquire a share otherwise. (Some members do, in fact, hold two shares.)

By art. 9a the Liverpool Grain Contract Insurance Co., a company formed for guaranteeing its members against default on certain contracts registered at the clearing house, may hold any number of shares not exceeding seventy-five. (It does in fact hold thirteen shares, but although it is a member of the Association it pays no entrance fee or subscriptions. The directors of the Association are the directors of the Liverpool Grain Contract Insurance Co. and vice versa. The capital of the Liverpool Grain Contract Insurance Co. is 400*l.*, and on a winding up all its surplus assets are to be transferred to the Association.)

By art. 10 shares may be allotted on the terms that the whole amount shall be forthwith paid up or that the whole or any part shall be paid by instalments, and the holder is not entitled to any rights or privileges as a member until his share is fully paid up.

By art. 20 the directors may also, with the sanction of the Association in general meeting, from time to time require each member to pay such annual subscription as they may think necessary. (Annual subscriptions of a substantial amount are in fact paid.)

By art. 22 all moneys received by the Association in respect of entrance fees, transfer fees, annual subscriptions, fines and otherwise under the by-laws shall belong to the Association absolutely, and may be dealt with in such manner as the directors from time to time think fit.

By arts. 23 and 24 the approval of the directors is required to any transfer of shares, and if they disapprove they may find a purchaser and compel the holder to transfer to him at a fair value to be settled by arbitration if necessary.

By art. 25, on the death, bankruptcy or retirement from business of a member, the directors may find a purchaser and compel the member or other person entitled to transfer the share to this purchaser at a fair value to be settled by arbitration if necessary. (Representatives of a deceased member are only allowed to hold his share temporarily.)

By art. 29, on bankruptcy of a member he ceases to have any rights or privileges of a member except the right of transferring his share.

By art. 25 the directors may from time to time elect such persons engaged in the corn trade, either as principals or otherwise, as they may think fit to be subscribers to the company. Subscribers shall be elected for such period on such terms of subscription, annual or otherwise, and shall be entitled to such privilege (other than the right of voting at any meeting of the company or of serving on any committee) as the directors may from time to time prescribe.

By art. 107 the directors may exercise all the powers of the Association which are not expressly required to be exercised by the Association.

By art. 109 the directors may set aside out of the profits a reserve fund for payment of debentures, meeting contingencies, equalization of dividends, repair and maintenance of property or for such other purpose as the directors think conducive to the interests of the Association. (On March 31, 1921, the reserve fund amounted to 74,000*l.*)

By art. 110 the Association in general meeting may, if the directors so recommend, declare a dividend to be paid to the members according to their rights and interests in

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the profits, but such dividend shall not exceed the amount recommended by the directors.

By art. 111 no dividend shall be payable except out of the profits of the Association, and no dividend shall carry interest as against the Association, and the declaration of the directors as to the amount of the net profits of the Association shall be conclusive.

By art. 112 the directors may from time to time pay to the members such interim dividends, if any, as in their judgment the position of the Association justifies. (No dividend has been declared since that declared for the year ending March 31, 1906.)

By arts. 119 and 120 the directors may make such by-laws as they think conducive to the Association's objects, and in particular for prescribing (inter alia) on what terms as to payment, etc., a subscriber who is not a member shall be entitled to use the exchange, rooms or market.

5. A copy of the Association's by-laws marked "B" was annexed to and formed part of this case.

By s. D of the by-laws, para. 3, it is the duty of the committee to conduct the business of the clearing house in respect of margins, declarations, tenders, clearances, payments, deposits and interest or discount to be paid or allowed thereupon and all other matters in connection with contracts made subject to these regulations.

By para. 5 it is provided that all disputes arising out of the settling, clearing or closing of contracts and out of any matter connected with the business of the clearing house shall be settled by the committee, and the decision, signed by the chairman or acting chairman, shall be binding on all parties subject to the right of appeal to the directors.

The committee may charge a fee for deciding cases of dispute brought before them and may determine by whom such fee shall be paid and the amount thereof.

By para. 6 the committee is empowered to impose fines for breach of regulations.

By s. E of the by-laws, para. 7, the following annual

subscriptions are charged for admission to the newsrooms, namely :—

(*a*) Members who are standholders in the corn market	£7 7 0	each
Country members who are standholders in the corn market . .	£5 5 0	each
(*b*) Members transacting business in grain for future delivery not being standholders, first member of firm . .	£15 15 0	
Each other member of firm . .	£10 10 0	
(*c*) Members who, not being standholders in the corn market, transact all their business in grain futures through and in the name of a member subscribing under ss. (*a*) or (*b*) hereof . .	£7 7 0	each
Country members hereof . . .	£5 5 0	each
(*d*) Subscribers	£7 7 0	each
Country subscribers . . .	£5 5 0	

By para. 11 any member or subscriber is entitled to the privilege of nominating for admission to the rooms a clerk or clerks in his employment. The member or subscriber exercising this privilege shall in addition to his own subscription pay an annual subscription of 8*l.* 8*s.* for each clerk so nominated subject to such variation as the Association from time to time may determine :—

By s. F of the by-laws, para. 4, the following annual subscriptions are payable by standholders and others using the market within market hours on market days :—

	Members.	Non-members.
(*a*) For floor stands		
Ordinary size . .	£21 0 0	£75 0 0
Extra size . . .	£31 10 0	£85 0 0
(*a*) (1.) for wall stands .	£52 10 0	£105 0 0

The following subscriptions (*b*) and (*c*) are limited to members only :—

(*b*) For firms selling or offering for sale grain or the products thereof without the use of a stand	£12 12 0

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(*c*) Firms transacting business in grain for future delivery not being standholders—

First member of firm	£15 15 0
Each other member of firm . . .	£10 10 0

This subscription includes admission to the newsrooms as provided by by-law 7 (*b*), s. E.

(*d*) For carriers, forwarding agents, carters, engineers, millwrights, sack dealers, sack brokers, ship and share brokers, insurance and other agents—

Principal	£7 7 0 each
Their clerks or assistants—	
Additional subscription . . .	£2 2 0 each

6. The Association owns a large building known as "The Corn Exchange," a portion of which is let off as offices, etc. The portion retained by the Association is used for the purposes of a market room, a newsroom, a clearing house, and generally for the purposes of the Association. The building is an old one, and is becoming less and less suitable for the purposes of the Association, and it is contemplated that in a few years it will have to be entirely rebuilt. The Association has borrowed money for the purpose of its undertaking upon the security of debentures, and it is with a view to paying off debentures, rebuilding and other capital expenditure that the reserve fund has been accumulated. The cost of rebuilding will exceed the amount of that fund. The corn market is attended by millers, bakers, dealers and others for the purpose of buying through standholders who may be members or non-members or through members transacting business without the use of a stand, and the persons mentioned in r. 4 (*d*) of s. F of the by-laws are admitted to the corn market on payment of a subscription.

The newsroom is used by both members and subscribers, but subscribers are not entitled to trade in the newsroom except through a broker who is a member.

The clearing house committee make regulations for

margins, declarations, tenders and clearances in connection with contracts and for the purposes of arbitration.

7. The following are the amounts of the entrance fees and subscriptions received by the Association for the years ended March 31, 1919, March 31, 1920, and March 31, 1921 :—

Newsroom.	No. of subscribers.	Year to March 31, 1919.	No. of subscribers.	Year to March 31, 1920.	No. of subscribers.	Year to March 31, 1921.
Members . .	188	£1344 16 0	198	£1422 13 0	210	£1504 1 6
,, Clerks	54	435 15 0	84	608 10 0	97	701 8 0
Subscribers Non-members.	9	55 13 0	8	48 6 0	14	68 5 0
Totals . .		£1836 4 0		£2079 9 0		£2273 14 6

Market.	No. of subscribers.	Year to March 31, 1919.	No. of subscribers.	Year to March 31, 1920.	No. of subscribers.	Year to March 31, 1921.
Members non-Standholders	43	£541 16 0	42	£538 1 0	41	£516 12 0
Standholders. Members and non-members .	112	3473 15 0	125	4014 15 0	127	4360 8 0
Subscribers Non-members.	50	274 0 0	50	272 6 6	77	277 1 6
Totals . .		£4289 11 0		£4825 2 6		£5154 1 6
Entrance Fees .	20	£2200 0 0	17	£4200 0 0	7	£3600 0 0

8. Up to March 31, 1918, all entrance fees and all subscriptions received by the Association, whether paid by members or non-members, were credited to the revenue account of the Association. For the years ended March 31, 1919, and March 31, 1920, all subscriptions were credited to revenue account, but entrance fees were carried direct to the balance sheet. For the year ended March 31, 1921, entrance fees and members' subscriptions were carried to the balance sheet and only subscriptions of non-members credited to revenue account. For the year ended March 31, 1922, entrance fees and all subscriptions were again credited to revenue account. Copies of the revenue accounts and balance sheets of the Association for the five years ended

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March 31, 1918, March 31, 1919, March 31, 1920, March 31, 1921, and March 31, 1922, marked C, D, E, F and G respectively were attached to and formed part of this case.

9. The Association provides market facilities and commercial accommodation and information, and performs many duties necessary to members and subscribers, such as dealing with the harbour authorities and allied industries, considering questions which may require legislation, and so forth. One of its chief duties is the conduct of the clearing house and the regulations for margins, declarations, tenders and clearances in connection with contracts. It provides the necessary personnel and accommodation for arbitrations. It supplies a covered place as the centre of business for grain traders to which those wishing to do business can resort for business with each other. It collects and issues market reports and prices from all over the world for the benefit of its members and subscribers and others resorting to the corn market. In addition to other minor activities indicated by its receipts, it has rendered considerable services to the Government Grain Commissions. The Association also provides accommodation for reading, writing, resting, etc., not only for members, but also for subscribers, who are non-members, including the supply of newspapers and periodicals, particularly those connected with the corn trade.

The payments made by members and others for services rendered through the clearing house, etc., are according to the services given, which depend on the amount of business done by the member or non-member, as the case may be. The greater part of the work of the clearing house is in connection with transactions in futures between members and members only.

10. On behalf of the Association it was contended :—

(*a*) That the Association does not carry on a trade, adventure or concern in the nature of a trade the profits of which are assessable to income tax.

(*b*) That so far as concerns transactions with its members the Association is a mutual one, and that any surplus

arising from such transaction is not a profit assessable to income tax.

(*c*) That the entrance fees paid by the members of the Association are analogous to premiums paid on the acquisition of shares, or to entrance fees paid by members of a club for enjoying the results of the outlay by former members, and are of the nature of capital and not income.

(*d*) That in computing the assessable profit (if any) of the Association, both entrance fees and members' subscriptions should be disregarded.

11. On behalf of the Crown it was contended :—

(*a*) That the Association carried on a trade adventure or concern in the nature of a trade, the profits of which were assessable to income tax.

(*b*) That the Association was assessable under Case 1 of Sch. D.

(*c*) That the Association was not a mutual association, whose transactions with the members were incapable of producing a profit.

(*d*) That the Association's transactions with the shareholders were such that the receipts from its members were trade receipts and that entrance fees and subscriptions payable by members should be included in the Association's receipts for the purpose of computing its profits assessable to income tax under Case 1 of Sch. D of the Income Tax Acts.

(*e*) That if it should be held that entrance fees and/or members' subscriptions are not to be included as receipts in computing the Association's profits a corresponding deduction should be made from the Association's expenses and that the whole of the Association's expenses should not be deducted from a part of the Association's receipts.

(*f*) That the facts distinguished the case from that of *New York Life Insurance Co.* v. *Styles.* (1)

12. The following cases were cited at the appeal : *New*

(1) 14 App. Cas. 381.

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York Life Insurance Co. v. *Styles* (1); *Carlisle and Silloth Golf Club* v. *Smith* (2); *Salomon* v. *Salomon & Co.* (3)

13. The Commissioners who heard the appeal gave their decision in the following terms:—

"On the first contention of the Association—viz., that it is not carrying on a trade assessable under Sch. D—we decide against the Association, and hold that the Association is carrying on a trade, adventure or concern in the nature of a trade, in respect of the profits of which the Association is assessable under Case 1 of Sch. D.

With regard to the Association's second contention—viz., that if engaged in trade at all it is engaged only in mutual trading so far as its transactions with members of the Association are concerned, and that no assessable profits can arise from those transactions—we have had some doubt, but on a survey of all the facts we decide on that point also against the Association. We are of opinion that the facts of this case differ so widely from the facts in the case of *New York Life Insurance Co.* v. *Styles* (1), which was strongly pressed upon us in argument, that it is impossible for us to regard that case as an authority in the present appeal.

We hold, therefore, that the Association is assessable under Case 1 of Sch. D on the whole of its profits (other than its rents), and we decide that the subscriptions and entrance fees received by the Association from its members must be regarded as income and included in the computation of the Income Tax assessment.

When the figures on the basis of this decision have been agreed between the parties we will give our final determination."

14. It was agreed by the parties to the appeal that on the basis of this decision the liability of the Association was 5298*l.*, and the Commissioner therefore reduced the assessment from 7500*l.* to 5298*l.*

Latter K.C. and H. P. Glover for the appellants.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the respondent.

(1) 14 App. Cas. 381. (2) [1912] 2 K. B. 177. (3) [1897] A. C. 22.

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ROWLATT J. In this case there was a company with a share capital of 60,000*l.* in 400 shares of the unusually large denomination of 150*l.* each, and its object was to maintain, and it did maintain, buildings for the purposes of the corn trade in Liverpool, and afford a number of facilities in those buildings. It made charges to its members and to other people proportionate to the use they made of the facilities; and it could, and at one time it did, declare a dividend upon its share capital. The major part of the clientèle of the company, or at any rate the more important part, were, I have no doubt, the members themselves, and I suppose the members joined in order that, as members, they might have the benefit of the facilities upon more reasonable terms than outsiders. They paid an entrance fee when they became members. There is nothing more to be said, I think, about the company, except perhaps this, that a member had to become a shareholder, but that he could not hold more than two shares, and if he had more than one the extra one might be requisitioned in order to enable a new entrant to obtain his share if he could not acquire a share otherwise.

The question here is whether the profit which the company makes out of what the members pay to it is taxable income of the business which the company undoubtedly carries on. That alleged profit consists of the amount by which the entrance fees of the members and their subscriptions for the various facilities exceed the cost of keeping up the buildings and affording the facilities. I do not see why that amount is not a profit. The company has a capital upon which dividends may be earned, and the company has assets which can be used for the purpose of obtaining payments from its members for the advantages of such use, and one is tempted to ask why a profit is not so made exactly on the same footing as a profit is made by a railway company who issues a travelling ticket at a price to one of its own shareholders, or at any rate as much a profit as a profit made by a company from a dealing with its own shareholders in a line of business which is restricted to the shareholders. If there were a

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railway company which only carried its own shareholders, one would say that when it afforded the advantage to a shareholder of performing an act of transit for him, being paid by the shareholder therefor, that the profit thereby made was a profit of the company just as much as if the shareholder was a stranger.

But what has to be considered is the effect of the decision of the House of Lords in the well known and very much discussed case of *The New York Life Insurance Co.* v. *Styles.* (1) Mr. Latter has contended that that case decided that a company, so far as it makes profits out of its members, does not make profits which are taxable as the profits of a trade or business. To avoid the absurdity of saying that a railway company is not to be taxable on the profits it makes by carrying its shareholders, some line has to be drawn which I find very difficult to lay my finger upon. Mr. Latter pointed out that in *New York Life Insurance Co.* v. *Styles* (1) emphasis was laid upon the fact that according to the admission of the Attorney-General in that case, which I must take the House as saying was rightly made, the fact that the persons associating themselves together for the purpose of mutual assurance had been incorporated makes no difference. But the Attorney-General in his argument puts the decision in *New York Life Insurance Co.* v. *Styles* (1) upon these grounds. He points out that in that case there was no share capital to provide any assets or to form the basis of any dividend ; that a corporation was created under the laws of New York, and those persons who came to that corporation and tendered premiums, and were accepted for life insurance on a participating basis became members of that corporation —not shareholders—and that the operation which was carried on and which was said to yield profits in that case was simply the operation of collecting money from those policy holders, and putting them under a proportionate liability to provide further moneys, if necessary, if there were losses, and, on the other hand, affording to those policy holders the protection of insurance and the possibility of a

(1) 14 App. Cas. 381.

dividend declared to them, not as shareholders in the ordinary sense, but as policy holders, which would be made good to them, not by a payment, but by a reversionary addition to the value of their policies. The Attorney-General said that in a case like that, where there is no share capital and no shareholders, but the policy holders are called members of the company, so that they may vote at meetings, then it does not matter whether or not there is an incorporation, because there is nothing belonging to the corporation which is severable from what belongs to the aggregation of the individual members; the corporation is merely an entity which stands at the back, and all it is doing is to collect from the policy holders certain funds and hand them back again so far as they are not wanted. But he contended that in a case of this kind where there is a company with a share capital, and shareholders with a right to dividends, if declared, upon the share capital, coupled with a dealing by the company with the persons who happen to be the owners of the share capital, affording benefits to those persons individually for which they pay money by way of subscriptions and by way of entrance fees as a sort of overriding subscription, if I may use that word, which opens the door to subscriptions, there is no reason at all for disregarding the fact that the company is incorporated, or for regarding otherwise than as profits the difference which is obtained by dealings between that corporation and the persons who happen to be its members. In my opinion that contention is correct. I hope I am not presumptuous, seeing I am only a judge of first instance, in saying that about the decision in the House of Lords, in spite of what was said in *Carlisle and Silloth Golf Club* v. *Smith.* (1) In that case it is important to bear in mind that there was no incorporation of the club, no independent share capital, and that really the members of the club were only providing themselves with the facilities of the golf course, so far as the members, of course, were concerned.

I was referred on both sides to the *Cornish Mutual Assurance*

(1) [1912] 2 K. B. 177; [1913] 3 K. B. 75.

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Co. v. *Inland Revenue Commissioners.* (1) In that case there was in the Finance Act, 1920, which dealt with the duty there in question—namely, the corporation profits tax—an express provision that "profits" should, in the case of mutual trading concerns, include the surplus arising from transactions with members, which looks as if it was put in to exclude what was thought to be the effect of *New York Life Insurance Co.* v. *Styles.* (2) On the other hand, there is in the Income Tax Act, 1918, an express provision exempting a society registered under the Industrial and Provident Societies Act, 1893, from income tax upon the profits made by the society from dealings with its members. I do not think that those two sections assist me in any way. I think they were both inserted by the Legislature for the purpose of saying that whatever might be the result of the decisions, in one case the profits were to be taxed, and in the other case the profits were not to be taxed. I do not think I can get any further assistance from that.

All I can say is that I am convinced by the Attorney-General's argument that the decision of the House of Lords in *New York Life Insurance Co.* v. *Styles* (2) does not help the appellants in this case, and that there is nothing in any other decision which prevents me from expressing my adherence to that argument. Therefore I think this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co., for Wilson, Cowie & Dillon, Liverpool.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1924] W. N. 295; [1926] A. C. 281. (2) 14 App. Cas. 381.

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.
1926
March 2, 3.

BUCKLE *v.* HOLMES.

Animal—Cat—Trespass—Damage to Poultry and Pigeons.

The owner of a cat is not bound to keep it from straying into a neighbour's land.

A cat belongs to the class of animals mansuetae naturae. For mischief done by it in following the common instincts of its kind, its owner is not liable. To make him liable he must have knowledge of some vicious propensity beyond those common instincts.

Therefore where a cat strayed from its owner's land into the land of a neighbour and killed fowls and pigeons kept there:—

Held, that the owner of the cat was not liable.

APPEAL from the judgment of a Divisional Court on an appeal from the county court of Yorkshire holden at Leeds.

The plaintiff, who lived at 190 Lower Wortley Road, Leeds, brought an action in the county court against the defendant, who lived at No. 151 in the same road. The plaintiff was a pigeon fancier. He also kept poultry. He claimed 8*l*. for the loss of thirteen pigeons and two bantams killed by the defendant's cat. The defendant did not deny that his cat had killed the birds. He contended that he was not in law liable for what the cat did in following the ordinary instinct of its kind. There was no evidence of any vice in the cat other than the habit common to all cats of straying and killing birds.

The county court judge held that the owner of a cat is not bound to keep it from killing pigeons in a cote or chickens in a chicken run, but that it was for the owner of the birds to keep them from becoming a prey to prowling cats. If he should be wrong in this opinion, and if a cat was to be included among domestic animals such as horses and dogs, he held that, as the defendant had no knowledge of any vicious propensity of his cat beyond the ordinary instinct of all cats, he was not liable. He therefore gave judgment for the defendant.

On appeal the Divisional Court (Shearman and Sankey JJ.) held that a cat was clearly one of the class of animals domitae

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or mansuetae naturae and not of the class of animals ferae naturae; that there was no authority for recognizing a third class of animals partly mansuetae naturae and partly ferae naturae; and that, as there was no evidence that the defendant knew of any particular vice in the cat, or that the animal had any particular vice, beyond the common habits of all cats, the defendant was not to be treated as the owner of a domestic animal having a vicious propensity known to its owner. With regard to the defendant's alleged liability for trespass to land and its consequences, the Court held that the owner of a cat, like the owner of a dog, was not bound to keep the animal from straying. They therefore dismissed the appeal.

The plaintiff's application for leave to appeal was refused. He afterwards obtained leave from this Court on condition of paying the costs incurred by both sides on the appeal to this Court and on any further appeal to the House of Lords.

Joy K.C., *G. Russell Vick* and *Sutcliffe* for the appellant. There is no authority for holding that the owner of a cat is not liable for its trespasses. It is a general principle that the owner of an animal, which is the subject of property, is responsible for its trespasses. One exception to this rule has been recognized. A dog may trespass without rendering its owner liable: *Mason* v. *Keeling* (1); *Beckwith* v. *Shordike* (2); *Cox* v. *Burbidge* (3); *Read* v. *Edwards* (4); *Sanders* v. *Teape*. (5) But except for an obiter dictum by Willes J. in *Read* v. *Edwards* (4) there is no authority for holding that a cat is another exception to the general rule. But even a dog may inculpate its master if to his knowledge it has a vicious propensity; for instance, if the owner knows that his dog is ferocious, he will be liable if it trespasses and bites another person; or if he knows that the dog has a tendency to kill young pheasants, he will be liable if the dog

(1) (1700) 1 Ld. Raym. 606; 12 Mod. 332.
(2) (1767) 4 Burr. 2092.
(3) (1863) 13 C. B. (N. S.) 430.
(4) (1864) 17 C. B. (N. S.) 245.
(5) (1884) 51 L. T. 263.

trespasses and does this: *Read* v. *Edwards* (1); and if a cat is like a dog in being an exception to the general rule, its owner also will be liable if he knows of a particular tendency in the cat to do mischief. The Divisional Court held that the owner of the cat was not liable because there was no evidence that he knew of any particular vice in the cat. But no evidence was necessary, because it is common knowledge that cats will kill pigeons or any other birds they can. This distinguishes the present case from *Manton* v. *Brocklebank*. (2) There an agister, who put a horse into a field with a mare, was held not liable for injury done by the mare to the horse because, although it was not contrary to experience that a mare should bite or kick a horse, this was not so common a tendency as that the Court would take judicial notice of it. If it had been common knowledge, like the tendency of a cat to kill pigeons, the decision would have been the other way.

[*Clinton* v. *J. Lyons & Co.* (3); *Bradley* v. *Wallaces, Ld.* (4); and *Heath's Garage* v. *Hodges* (5) were also cited.]

Sandlands for the respondent was not called on.

BANKES L.J. We gave leave to appeal in this case, not because we thought there was any real doubt about the law, but because the question was one of general importance and one upon which further argument and a decision of this Court would be to the public advantage. The case has now been further and very fully argued, with the result that I am clearly of opinion that the judgment of the Divisional Court was right. I do not propose to trace the development of the common law relating to the liability of individuals for damage done by animals belonging to them, because most of the authorities were lately cited to and considered by this Court in *Manton* v. *Brocklebank* (2), and the position will be better understood by the parties interested if I state my view without reference to decided cases.

The responsibility of the owners of animals for damage

(1) 17 C. B. (N. S.) 245.
(2) [1923] 2 K. B. 212.
(3) [1912] 3 K. B. 198.
(4) [1913] 3 K. B. 629.
(5) [1916] 2 K. B. 370.

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Bankes L.J.

done by them has developed along two main lines, one a branch of the law of trespass, and the other a branch of the law which imposes upon the owner of a dangerous animal or thing a duty to take measures to prevent it from doing damage. With respect to this second branch there are two classes of animals. The first includes animals ferae naturae, for example a tiger or a gorilla, which are obviously of a dangerous nature, although individuals may be more or less tamed. A person who keeps an animal of this class keeps it at his peril. If he loses control of it and it does damage he is responsible. The second class includes dogs, cows, and horses, which are not naturally dangerous to mankind. Of this class individuals may develop dangerous propensities, but unless and until they do so they are not treated as belonging to the class of animals which the owner keeps at his peril; and, leaving trespass aside for the present, the owner is not responsible for damage which these animals may do when not trespassing. An individual of this class, however, may cease to be one for whose damage its owner is not responsible, if it has given him indications of a vicious or dangerous disposition. When the animal has been found by its owner to possess such a nature it passes into the class of animals which the owner keeps at his peril.

I come now to the other branch, the responsibility for trespass. Generally speaking the owner of an animal is responsible if it trespasses; but the common law in its common sense admits of exceptions to this general rule, and among the exceptions is the dog. The reason for this exception has been stated in various ways at different times. I adopt the reason given by Willes J. in *Cox* v. *Burbidge* (1): "I can quite understand a distinction being drawn between animals which from their natural tendency to stray, and thereby to do real damage, require to be and usually are restrained, and a dog, which is not usually kept confined: and there may be good reason besides 'de minimis non curat lex' why an action should not lie against a man whose dog without the will of its master enters another's land, though it is different

(1) 13 C. B. (N. S.) 430, 440.

in the case of a horse or an ox." To expand that, we can easily see why the law should hold the owner of a horse or an ox responsible for trespass; any trespass by those animals must cause some damage, even when the animal is merely wandering about and eating what attracts it. Trespass by a dog is very different; a dog following its natural propensity to stray is not likely to do substantial damage in ordinary circumstances, although it might do so by rushing about in a carefully tended garden; but those who administered the law in the course of its development had regard not to exceptional instances but to the ordinary experience of a dog's habits, and they also took into account that the dog, a useful domestic animal, must be used if at all according to its nature; that it cannot ordinarily be kept shut up, and that the general interest of the country demands that dogs should be kept and that a reasonable amount of liberty should be allowed them. Therefore dogs are placed by the common law in a class of animals which do not by their trespasses render their owners liable. I can see no possible distinction between a dog and a cat. Attention was called to the natural propensity of a cat to pursue pigeons. That point might be material if the question was whether a cat was to be placed in the class of dangerous animals; but it was most properly admitted by Mr. Joy that the test to be applied in solving that question is danger to mankind. Upon the question whether the owner of a cat is responsible for its trespass, the natural propensity of cats to pursue and devour birds has, in my opinion, no bearing. A dog is not excluded from the excepted class by the fact that some young dogs will chase sheep, and it is impossible to hold the owner of a cat responsible for its trespass which results in damage to his neighbour's pigeons or poultry. The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion, and have nothing to add.

ATKIN L.J. I agree. I think the conclusion in this case follows from *Manton* v. *Brocklebank* (1), which makes it clear

(1) [1923] 2 K. B 212

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that one who keeps a domestic animal is not rendered liable by the mere fact that the animal does damage in following a natural propensity of its kind to do damage in certain circumstances; unless the animal is one for whose trespasses the owner is liable. Where the owner is liable for the animal's trespasses it may be material to consider whether the damage it does is the result of a normal propensity. For this damage the owner is liable; but for damage resulting from an abnormal propensity not known to him he is not in my opinion liable, though he would of course be liable for the ordinary consequences of the trespass.

But in the present case the question is whether a cat is an animal for whose trespasses its owner is liable. Now a dog is an animal for whose trespasses its owner is not liable, even though while trespassing it does damage in obedience to the ordinary instincts of its kind. I agree with Bankes L.J. that a cat must be placed in the same category as a dog, when the liability of its owner for its trespass is in question. It follows that the owner is not responsible when his cat trespasses and does damage which merely consists in following a natural propensity of its kind.

Appeal dismissed.

Solicitors for appellant: *Hamlins, Grammer & Hamlin, for Harland & Plackett, Leeds.*

Solicitors for respondent: *Collyer-Bristow & Co., for A. Masser, Leeds.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.

1926
March 10, 11, 26.

SWIFT AND COMPANY *v.* BOARD OF TRADE.

Emergency Legislation—Food Control—Defence of Realm Regulations, Reg. 2 F —Requisition under—Assessment of Compensation—Matters to be taken into Consideration—Costs of Arbitration—Power of Arbitrator to award Costs against Crown—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 23, 24.

The Food Controller, acting under powers conferred by reg. 2 B of the Defence of the Realm Regulations, requisitioned all the bacon landed in this country on or before a certain specified date, and at the same time, acting under powers conferred by reg. 2 F, requisitioned all bacon landed in this country after the said date :—

Held (by Bankes and Warrington L.JJ.; Atkin L.J. dissenting on both points) :—

1. That, in assessing the compensation to be paid for the bacon requisitioned under reg. 2 F, the arbitrator to whom the matter was referred was entitled to take into consideration the fact that the Food Controller was already in possession of large stocks of bacon requisitioned under reg. 2 B.

2. That the arbitrator had no power to order the Crown to pay the costs of the reference and award.

APPEAL from an award of A. T. Miller K.C. sitting as a special arbitrator appointed under the Imported Bacon, Ham and Lard (Requisition) Order, 1919, No. 976.

By reg. 2 F of the Defence of the Realm Regulations the Food Controller was empowered to requisition by Order any article or stocks when it appeared to him necessary or expedient to make such order for the purpose of encouraging or maintaining the food supply of the country, and it was provided that such compensation should be paid for any article or stock so requisitioned as should, in default of agreement, be determined by the award of a single arbitrator appointed in manner provided by the Order.

By the Imported Bacon, Ham and Lard (Requisition) Order, 1919 (No. 976 of the Statutory Rules and Orders, 1919), the Food Controller in exercise of the powers conferred upon him by the above regulation, requisitioned all bacon, ham and lard discharged from ship in Great Britain after August 9, 1919, and the Order provided that the arbitrator to determine the compensation to be paid therefor should

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be appointed, as to bacon, etc., discharged from ship in England or Wales by the Lord Chancellor of Great Britain, and as to bacon, etc., discharged from ship in Scotland by the Lord President of the Court of Session.

Messrs. Swift & Co., of Chicago, claimed compensation for bacon, etc., so requisitioned by the Food Controller, and, no agreement being reached as to the amount of such compensation, the Lord Chancellor and the Lord President appointed Mr. A. T. Miller K.C. to determine the compensation to be paid to the said claimants. In the course of the arbitration the respondents formulated the following, among other points, upon which they desired the arbitrator to give an express ruling :—

1. That among other conditions existing at the time when the Food Controller requisitioned under D. R. R. 2 F the claimants' goods, and which would have affected their realization apart from such requisition, were the following :—

(A) The requisition of hog products by the Food Controller on August 9, 1919, under D. R. R. 2 B, and the circumstance that such goods were thereafter at his disposal.

3. That the arbitrator had no jurisdiction to award costs.

The arbitrator determined that the total amount of the compensation payable to the claimants in respect of their bacon, etc., requisitioned under reg. 2 F was the sum of 2,289,651*l.*, of which amount they had received by way of provisional payment 2,110,651*l.*, and he awarded that there was due to them the difference between the said two sums—namely, 179,000*l.*

On the specific questions submitted by the respondents he held :—

Question 1 (A). That as the Food Controller on August 9, 1919, requisitioned bacon, etc., under reg. 2 B, he, the arbitrator, should take into account, and in arriving at the above figure did take into account, such requisition as one of the circumstances existing at the time when the Food Controller requisitioned the claimant's goods under reg. 2 F. If he was wrong in so deciding, and the compensation to the claimants had to be assessed upon the assumption that

there was no requisitioning of hog products by the Food Controller either under reg. 2 F or reg. 2 B, he was of opinion that the claimants would have been in a position to realize their 2 F goods to better advantage, and he assessed the increase in the compensation which would in that event be payable to the claimants at 6000*l.*

Question 3 B. He held that he had no power to award costs.

The claimants appealed on both points.

Sir John Simon K.C., *Raeburn K.C.* and *Darby* for the appellants. In August, 1919, it was the policy of the Government to prevent private trading in bacon in this country. For that purpose it was necessary to get control (*a*) of all bacon already in the country, and (*b*) of all bacon to arrive from abroad. The Food Controller had power under two of the Defence of the Realm Regulations to requisition any article of food such as bacon—namely, reg. 2 B and reg. 2 F (1)—and in any particular requisition it was at

(1) By reg. 2 B of the D. O. R. Regulations: "It shall be lawful for the Admiralty, Army Council, or Air Council, or the Minister of Munitions to take possession of any . . . . food." . . . . "Where any goods possession of which has been so taken are acquired by the Admiralty, Army Council, or Air Council, or the Minister of Munitions, the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined." . . . . "The Food Controller may, as respects articles to which his powers under regs. 2 F and 2 J extend, exercise the like powers as are by this regulation conferred on the Admiralty, Army Council, Air Council and Minister of Munitions."

By reg. 2 F (2.): "The Food Controller may by Order require all or any persons owning or having power to sell or dispose of any article, or any stocks thereof, to place at the disposal of the Controller the article, or the whole or any part of the stocks thereof, as may be directed by the Controller . . . . where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country."

"Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in the manner provided by the Order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time."

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his option to say under which regulation he proceeded. One difference between those two regulations was that in the case of the former the Controller had power to requisition directly under the regulation, in that of the latter only indirectly after making an Order for the purpose. Accordingly by the Imported Bacon, &c. (Requisition), Order, 1919, being No. 976 of that year, and dated August 8, 1919, the Controller required all bacon discharged in Great Britain from ship after August 9, 1919, to be placed at his disposal, and by a circular letter of the same date, August 8, addressed to all members of the trade who were known to hold bacon in this country he gave notice that "all consignments of imported bacon, ham and lard discharged on or before 9th August, 1919, and still unsold by packers' agents at mid night of 8th August, 1919, are requisitioned by the Food Controller under reg. 2 B of the Defence of the Realm Regulations by special letter addressed to each individual packer's agent under separate cover. All imported bacon, ham and lard . . . . which are discharged from ship in Great Britain after 9th August, 1919, are requisitioned by the Food Controller under the Imported Bacon, Ham and Lard (Requisition) Order, 1919." By the terms of the last mentioned Order, No. 976 (1), compensation for any article requisitioned under that Order was to be determined by a single arbitrator appointed by the Lord Chancellor or the President of the Court of Session, the arbitrator so appointed in the present case being Mr. Miller K.C. The compensation, on the other

(1) By the Imported Bacon, Ham and Lard (Requisition) Order, 1919, No. 976:—

¶ 1. (*a*): "The Food Controller hereby requires every person owning or having power to dispose of any bacon, ham or lard which may be discharged from ship in Great Britain after the 9th August, 1919, to place the same at the disposal of the Food Controller and deliver the same to him or to his order."

(*b*) "The arbitrator to determine in default of agreement the compensation to be paid for any bacon, ham or lard requisitioned under this clause shall be appointed, as to bacon, ham or lard which may be discharged from ship in England or Wales, by the Lord Chancellor of Great Britain, and as to bacon, ham or lard which may be discharged from ship in Scotland, by the Lord President of the Court of Session."

hand, for bacon, etc., requisitioned under reg. 2 B is by s. 2, sub-s. 4, of the Indemnity Act, 1920, to be determined by the War Compensation Court. The matter referred to the arbitrator was the amount of compensation payable to the claimants, Messrs. Swift & Co., a large meat packing firm in the United States, for bacon belonging to them which had been discharged from ship after August 9, and the question arose whether in assessing that compensation the arbitrator was entitled to take into account the fact that the Food Controller was in possession of large stocks of bacon which he had requisitioned under reg. 2 B, and which, by being in competition in the market with the claimants' 2 F bacon, would tend to lower the price obtainable by them for it. The arbitrator held that he was so entitled, and it is contended by the claimants that in so holding he was wrong. The amount of compensation payable for anything compulsorily taken is the value of that thing to the owner, that is to say, what he could have got for it in the market if it had not been taken. But what are the conditions under which it is to be assumed that he goes into the market? Is it to be assumed that other owners' goods of the same kind have not been requisitioned? and if so, whose? The Crown has conceded in this case that the 2 F bacon of other foreign meat packers, such as Armour & Co., is to be treated for this purpose as not having been requisitioned, but it contends that bacon requisitioned under 2 B, to whomsoever belonging, is to be taken into consideration. It is difficult to see what distinction can be drawn between those two classes. The claimants' contention is that the case ought to be dealt with as though no bacon at all had been requisitioned, and as though the Food Controller had no statutory powers in that behalf. This is in conformity with the principle of compensation under the Lands Clauses Act. In *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1) Lord Dunedin, dealing with the principles upon which compensation for land taken is to be awarded, says: "The value to be paid for is the value to the owner as it existed at the date of the

(1) [1914] A. C. 569, 576.

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taking, not the value to the taker. . . . . That price must be tested by the imaginary market, which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility." The principle is stated in similar terms by Lord Buckmaster in *Fraser* v. *City of Fraserville.* (1) You may take into consideration the possibility that, having regard to the nature of the land and its suitability for a particular undertaking, undertakers may in the future acquire powers to take it, but not that they have already got them. If undertakers propose as parts of one and the same scheme to take a number of different pieces of land the compensation payable to one owner cannot depend on the fact that other pieces belonging to other persons have been already taken. It cannot be increased or diminished by that fact, for if it could the compensation would depend on the order in which the different pieces were taken. So here, for the purpose of assessing the claimants' compensation for the requisition of their 2 F bacon, it must be assumed that no 2 B bacon has been requisitioned, and that the Food Controller has not acquired the statutory powers which make his control of the bacon market " a realised possibility." No doubt if undertakers, having already taken land under statutory powers, and being desirous of extending their undertaking, acquire fresh powers, and take further land under them, it will be material, for the purpose of assessing the compensation to be paid for the land last taken, to consider that they are already in possession of the other land, the two transactions being distinct and independent. But here the transactions are not independent. The directions by which the Food Controller requisitioned the 2 B bacon and the 2 F bacon were parts of one scheme. They were made on the same day, August 8, 1919, and enclosed in the same envelope, and neither would have been operative without the other. The other side rely on a passage in the judgment of the Lord Chancellor, when this case was before the House of Lords (2), on appeal upon another point. Lord Cave

(1) [1917] A. C. 187, 194. (2) [1925] A. C. 520, 531.

said: "His," the arbitrator's, "duty was to ascertain what, if not requisitioned," the goods "would have produced to the owner under all the conditions which existed at the time when they would have been sold," and it is now said that among those conditions was the fact that the Food Controller was in possession of large stocks of 2 B bacon. But that language was used alio intuitu, for Lord Cave went on, "and among those conditions would have been the existence of the statutory maximum prices." Para. 2 of reg. 2 F provided that in determining the amount of the compensation the arbitrator should "have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article." The arbitrator gave the claimants a sum equal to the cost of production plus a reasonable profit without regard to the fact that there was in existence a Maximum Prices Order, which would have prevented them from getting as high a sum in the market. It was with his attention directed solely to the arbitrator's disregard of the Maximum Prices Order that Lord Cave used the language which is relied upon. The subject of 2 B bacon was not then discussed, and was presumably not present to his Lordship's mind.

The second question is whether the arbitrator had jurisdiction to award costs against the Crown. He held that he had no power to give costs, but said that if he had he would have given the claimants their costs. It is commonly said that the Crown neither pays costs nor receives them. But the rule to that effect originated at a time when the Crown appeared in any legal proceedings only as the "actor," the party commencing the proceedings. At common law the Crown could not be a defendant. In view of that fact the rule must be understood as limited to cases in which the Crown is the actor. Blackstone in his Commentaries, vol. iii., p. 400, so limits it. He says: "The King (and any person suing to his use) shall neither pay nor receive costs." In *Rex* v. *Miles* (1), where in an action of scire facias at the

(1) (1797) 7 T. R. 367.

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suit of the Crown to repeal a patent, the verdict passed for the Crown, it was held that no costs were payable. So also in *The Leda* (1), where in an action of damage by collision instituted on behalf of the Crown and of the commander and crew of one of Her Majesty's ships against a private ship-owner, judgment was given for the defendant, Dr. Lushington held that no costs could be given against the Crown, for before the Crown Suits Act, 1855 (18 & 19 Vict. c. 90), the Crown never paid costs, though in some few cases in equity it received them, and that Act, which authorizes the giving of costs for or against the Crown, only applies to cases in which the Attorney-General or Lord Advocate is a party to the suit, which was not the case in the action before him. In both those cases the Crown was the plaintiff, and the qualifications introduced by the Crown Suits Act also only apply where the Crown is plaintiff. The reason for the common law rule was by no means clear. Blackstone suggests that it was because the Crown was not named in the Statute of Gloucester (6 Edw. 1, c. 1), but at the same time he concedes that before that statute costs were given, as between subject and subject, under another name. He says, vol. iii., p. 399, that to all judgments "costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that 'victus victori in expensis condemnandus est,' though the common law did not professedly allow any." He went on to say that "The first statute which gave costs eo nomine .... was the Statute of Gloucester .... though in reality costs were always considered and included in the quantum of damages." But whatever the origin of the common law rule that the Crown neither paid nor received costs may have been, it is not one to be extended, and ought not to be applied to cases where the Crown is a defendant. In the case of a petition of right where the Crown, by virtue of the Attorney-General's fiat, becomes a defendant with its own consent there is power to give costs, s. 12 of the Petition of Right Act, 1860, expressly providing that "upon any such petition of right the suppliant shall

(1) (1863) Br. & Lush. 19.

be entitled to costs against Her Majesty " to the same extent as in proceedings between subject and subject. In the present case if Parliament had not decided in reg. 2 F that the compensation should be determined by a special arbitrator the remedy of the claimants would have been by petition of right, with the consequent jurisdiction of the Court which heard the petition to allow them costs. When the Crown by the regulation was made a compulsory defendant, the new tribunal, which was substituted for the Court which would have heard a petition of right, must have been intended to have the same power over costs. The regulation must be read as conferring on the arbitrator all incidental powers, including those over costs. It is said on the other side that s. 23 of the Arbitration Act, 1889, negatives the power of an arbitrator in an arbitration to which the Crown is a party to deal with costs. It says that " Nothing in this Act . . . . shall affect the law as to costs payable by the Crown." But this is not an arbitration under the Arbitration Act at all, for s. 23 expressly excludes its application to arbitration proceedings taken without the Crown's consent. It is true that by s. 24 the Act is to apply to every arbitration " under any Act passed before or after the commencement of this Act." But this arbitration is not " under any Act," but under a regulation which, though it has the force of an Act, is not in terms an Act. Moreover, even if the provisions of s. 23 do apply to it, the section does not say that the Crown is not to be liable; it only leaves the liability exactly where it was before. If the party entitled to compensation does not get costs he does not get full compensation, for costs are, as Blackstone says, really part of the damages. In *Johnson* v. *The King* (1) Lord Macnaghten, delivering the judgment of the Privy Council, laid it down that the exceptions to the general rule that the Crown neither pays nor receives costs "fall under one or other of the following three heads: 1. Cases where the Crown has been treated as an ordinary litigant, under the authority of local statutes, as is generally the case in the self-governing colonies. 2. Cases where the

(1) [1904] A. C. 817, 824.

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question arose under a petition of right, or some proceeding analogous to a petition of right. 3. Exceptional cases, where justice seemed to require that the Crown should pay costs, or where the Crown was not unwilling to be treated as an ordinary litigant." The present case is a proceeding analogous to a petition of right, for, as said above, the remedy, but for reg. 2 F, would have been by petition of right, and the Legislature cannot have intended by an alteration of the tribunal to affect the substance of the remedy. It is also an "exceptional case" within Lord Macnaghten's third class. The claimants pray in aid the Indemnity Act, which proceeds on the footing that the arbitrator has such power. By s. 2, sub-s. 4, it provides three different tribunals for the assessment of compensation: (1.) the Admiralty Transport Arbitration Board, which deals with the requisition of ships; (2.) the War Compensation Court, which deals with interference with property of other kinds; and (3.) the Special Tribunal prescribed by one of the Defence of the Realm Regulations, as is the case here. The Act by s. 2, sub-s. 6, provides that the two former tribunals shall have power to compel the attendance of witnesses and production of documents "in like manner as in proceedings before an arbitrator." It treats the three tribunals as on the same footing, and then goes on expressly to authorize the two former to "award such sums by way of costs as they in their discretion may think just." That necessarily includes a possible award of costs against the Crown. The sub-section is silent as to a corresponding power of the special arbitrator to give costs, not because there was any intention to differentiate between the three classes of tribunals in that respect, but because it was assumed that a special arbitrator had already got that power in the same way that he had already got the power to compel the attendance of witnesses. The supposition that the special arbitrator was not intended to have power over costs would lead to absurd results. Suppose a ship had arrived in dock on the evening of Saturday, August 9, 1919, with a hundred cases of bacon on board, and discharged fifty cases that night, leaving the other fifty to be discharged

on the Monday morning. The assessment of compensation for the first fifty would have to be decided by the War Compensation Court, that for the second fifty by the special arbitrator. Could it possibly be contended that costs could be given against the Crown in respect of one parcel and not in respect of the other?

But even if the arbitrator had not otherwise a power to award costs he derived such a power in the present case from the conduct of the parties. Upon the interim award of the arbitrator coming before the Court of Appeal that Court allowed the appeal, and made an order for the payment of the Crown's costs by the claimants. Those costs were duly paid and received by the Crown. But the liability to costs must be mutual. Therefore the hearing must have proceeded throughout upon the assumption that the parties had respectively agreed to incur the risk of having to pay costs if the award went against them.

Sir Thomas Inskip S.-G., *Sir Patrick Hastings K.C.* and *Bowstead* for the respondents. When Lord Cave on the appeal to the House of Lords in the present case said (1) that it was the arbitrator's duty to ascertain "what, if not requisitioned they (the goods) would have produced to the owner under all the conditions which existed at the time when they would have been sold," he meant what he said, and did not intend his proposition to be read as limited to the particular condition of the existence of the statutory maximum prices. The Food Controller had at his disposal 120,000 boxes of bacon already requisitioned under reg. 2 B, and was consequently in a position to prevent the claimants from getting the prices which they otherwise would get. That fact the arbitrator was bound to take into consideration. Suppose the War Office, which also had power to requisition food under reg. 2 B, had requisitioned large stocks of bacon and sent it to Mesopotamia, would that not have been a matter for the arbitrator to take into consideration when assessing the value of the claimants' goods? No doubt the answer to that question largely depends upon whether the requisition under

(1) [1925] A. C. 531.

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reg. 2 B and the requisition under the Order made under reg. 2 F were part and parcel of one scheme. Whether they were so or not is a question of fact for the arbitrator to determine. In *Fraser* v. *City of Fraserville* (1) Lord Buckmaster said: "The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case." Here the arbitrator must be taken to have found as a fact that the two requisitions were not parts of one scheme. They were parts of one policy certainly, but not of one scheme, for reg. 2 B provides a different method of taking possession—namely, directly under the regulation without the intervention of any Order, as is required under reg. 2 F. It was not necessary that the Food Controller should follow up a requisition under 2 B with one under 2 F, for he might have got sufficient bacon for his purpose under the former.

Secondly, the question as to costs. Before the Arbitration Act, 1889, when a cause alone or a cause and all matters in difference were referred and nothing was said in the submission respecting costs, the arbitrator had an implied authority to adjudicate respecting the costs of the cause, but not of the reference or award. (2) The Arbitration Act now by s. 2 enacts that "a submission . . . . shall be deemed to include the provisions set forth in the First Schedule to this Act," cl. i. of which provides that "the costs of the reference and award shall be in the discretion of the arbitrators." The present arbitration is no doubt not under any submission, but it must be treated as if it were, for by s. 24 the Act is to "apply to every arbitration under any Act . . . . as if the arbitration were pursuant to a submission," and here the arbitration is directed under the Defence of the Realm Act and reg. 2 F (2.) made thereunder. Therefore if this were a case between subject and subject the arbitrator would have jurisdiction to award

(1) [1917] A. C. 194. (2) Russell on Arbitration, 6th ed., p. 381.

costs to the claimants. But the defendant is the Crown, and by s. 23 "nothing in this Act . . . . shall affect the law as to costs payable by the Crown." That throws one back to the position at common law, and by the common law there was no power in any tribunal to give costs for or against the Crown. No authority can be found for the proposition that the general rule, that the Crown neither pays nor receives costs, is limited to cases in which the Crown is the actor. Long before the Petition of Right Act the Crown was often a defendant, but no costs were ever given in such cases. Then if there is no power at common law to give costs against the Crown the Arbitration Act does not confer it. Nor does any other Act do so. The Indemnity Act, 1920, is silent as to payment of costs in such a case as this, and it cannot be inferred that that silence was unintentional. The fact that the Legislature expressly gave power under s. 2, sub-s. 6, to the Board of Arbitration and the War Compensation Court to award costs suggests that they intentionally excluded special arbitrators from such a power. And there may have been a good reason for this, in view of the fact that the two former tribunals were intended to consist largely of lawyers, whereas the special arbitrator might be a layman. At the most the silence as to costs of a reference before a special arbitrator must be regarded as casus omissus, and not as proceeding on the supposition that an express power to award them was unnecessary. This case does not fall within any of the exceptions mentioned by Lord Macnaghten in *Johnson* v. *The King*. (1) It is not analogous to a petition of right, nor is it an exceptional case in which justice requires that the Crown should pay costs.

The contention that the arbitrator derived a power over costs from the conduct of the parties cannot be supported. The fact that the Crown accepted costs of the hearing before the Court of Appeal does not deprive it of the right of insisting that the ordinary law applied to the hearing before the arbitrator. There is an express power given to the Court of Appeal in such a case, which the arbitrator has not got. The

(1) [1904] A. C. 817.

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hearing before the Court of Appeal was under proviso (i.) to s. 2, sub-s. 1, of the Indemnity Act, and Order LV.B, r. 47, of the Supreme Court Rules says that the rules of Order LVIII., including r. 4, which gives the Court of Appeal power to order payment of the costs of the appeal, shall apply to an appeal under that proviso. There was in fact no agreement here that the arbitration should proceed on the footing that the loser should pay costs. Nothing was said about costs till the end of the hearing before the Court of Appeal, and it cannot be inferred ex post facto that there was an antecedent agreement to that effect binding on both parties.

Sir John Simon K.C. in reply.

Cur. adv. vult.

March 26. The following written judgments were delivered:—

BANKES L.J. This is the second occasion upon which this Court has been appealed to in order to decide questions of law which have arisen in the course of an inquiry by an arbitrator as to the amount of compensation payable to the appellants by reason of the requisition by the Food Controller in August, 1919, of all hog products the property of the appellants consigned to this country after the date of the Order. On the first occasion one of the questions for decision was whether in arriving at the amount of compensation the arbitrator was entitled to award as compensation an amount calculated at higher prices than those at which the goods could have been sold under the Maximum Prices Order, which came into operation at practically the same time as the Requisition Order. It was held by this Court and by the House of Lords that the arbitrator was wrong in determining the compensation without regard to the provisions of the Maximum Prices Order. In the present case the question of law submitted by the arbitrator on the question relating to the amount of compensation which he is entitled to award is whether he should take into account the Order of the Food Controller of August 9, 1919, requisitioning bacon, ham and lard under the Defence of the Realm Regulations 2 B. The

arbitrator has held that he was so entitled. In my opinion he was right in so holding. The history of the Government control during the war of imported and of home produced bacon, ham and lard is fully set out in the argument of the Attorney-General (1) before this Court in the previous case, and in the statement of the facts by the Lord Chancellor (2), and it is not necessary to go into that history again at length. For present purposes it is sufficient to say that after a period free from control lasting from March, 1919, to August, 1919, imported hog products came again under control by Orders which were the subject of consideration in the previous case. Those Orders are the Imported Bacon, Ham and Lard (Prices) Order, 1919, which is dated August 6, 1919, and numbered 977 of 1919, and which came into force (with the exception of certain classes of imported goods) on August 11, 1919. The other Order is the Imported Bacon and Lard (Requisition) Order, 1919, which is dated August 8, 1919, and numbered 976 of 1919, and which was applied to any bacon, ham or lard discharged from ship in Great Britain after August 9, 1919. The argument of Sir John Simon (1) in the previous case for the present appellants was that the fixing of prices and the requisition were part and parcel of the same operation, and the Maximum Prices Order was only part of the scheme, and that in assessing compensation it was not competent for the Crown to rely upon any part of the operation as a ground for reducing the amount of compensation to which the present appellants were entitled. The argument for the appellants in the present case appears to me to be substantially the same, though it has been elaborated, and decisions under the Lands Clauses Act have been cited in aid of it. The question for decision on this part of the appeal appears to me to depend upon whether there is any real distinction in principle between the case which has already been decided and the present one. It is true that a new factor has been introduced—namely, the requisition order of August 8, 1919, made by the Food Controller under reg. 2 B, under which he took possession of all imported bacon, ham and lard

(1) 40 Times L. R. 425. (2) [1925] A. C. 521-3

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discharged from ship on or before August 9, 1919. This is the order which the learned arbitrator considers that he is entitled to take into consideration, though judging by the additional amount he awards, if it is decided that he was wrong, it would appear that he does not consider that the order made any very substantial difference to the appellants having regard to the huge volume of their imports. The contention for the appellants is that the arbitrator was bound to ignore the existence of this order altogether. The argument in support of the contention is, as I have said, substantially the same as was advanced in the previous case. The authorities which were relied upon in support of it have, in my opinion, no real bearing upon the question which we have to decide. The rules regulating the compensation to be paid for the compulsory taking of land under the Lands Clauses Acts depend upon considerations which appear to me irrelevant when considering the compensation payable to traders importing goods into this country under conditions imposed by the State in the interests of the community at large and under the stress of war. Apart from this consideration altogether, it appears to me that the language used by the learned judges in the cases referred to, and relied upon by the appellants' counsel as laying down a principle, was in every case language insisting that the value to be arrived at was the value to the seller, and not to the buyer of the property, and laying down rules which should prevent inflation of prices as a result of not adopting this principle. In my opinion the question for decision in the present appeal was in principle decided in the previous appeal. In the last case I was quite prepared to accept the view that the Requisition Order under reg. 2 F and the Maximum Prices Order were part of one considered policy, and I am prepared to go one step further in the present case and include the requisition under reg. 2 B as a part of the same considered policy. I cannot see any sufficient reason for thinking that if the Maximum Prices Order was not to be ignored in assessing the compensation payable to the appellants the requisition order under reg. 2 B is not to be taken into consideration.

Both are intimate parts of the same policy: both equally, though in different ways, affected the market in which the appellants' goods had to be disposed of. It is quite true that the Lord Chancellor's language in the previous case (1) was not directed to the particular point which we have to decide, because the effect of the requisition under reg. 2 B was not then before the Court, but if my view is right the reasoning which underlies the passage in the speech which is relied upon by the Crown applies equally to the present case. For these reasons the appeal upon this question fails, and the answer to the question of law submitted to us is that the arbitrator was right in taking into account the requisition under reg. 2 B as one of the circumstances existing at the time when the Food Controller requisitioned the claimants' goods under reg. 2 F.

What the decision upon the other part of the case ought to have been had the Arbitration Act, 1889, not applied it is needless to consider. Once it is conceded, as it had to be conceded, that the effect of s. 24 of that Act is to apply the Act to an arbitration under cl. 1 (*b*) of the Requisition Order under reg. 2 F, as if the arbitration was pursuant to a submission, it seems to me clear that the arbitrator was right in deciding that he had no power to award costs. An attempt was made to show that so far as the power to award costs was concerned the Arbitration Act is inconsistent with the Act regulating the arbitration, and therefore to that extent the Arbitration Act did not apply. The argument was founded upon the provisions of the Indemnity Act, 1920, which expressly gives power to the Board of Arbitration and to the War Compensation Court to award costs, and it was argued that it was inconceivable that the Legislature should have given this power expressly to these two tribunals who have to deal with questions of compensation arising under the Defence of the Realm Regulations and should not impliedly have granted it in the case of an arbitrator appointed under the Requisition Order No. 976 of 1919. This argument, even if it was accepted, does not in my opinion go far enough to bring the case within

(1) [1925] A. C. 527.

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the exception to s. 24 of the Arbitration Act. I am unable, however, to accept it, as it appears to me quite reasonable to treat the Indemnity Act as providing for the procedure and powers of the particular tribunals with which it deals, leaving all other tribunals to the power and procedure which they may have under the statutory authority which created them. There being no express agreement between the parties giving the arbitrator power to award costs, he could have no such power unless it is to be implied or is given by the Arbitration Act. I have dealt with part of the argument in support of an implied authority. It was further urged that authority ought to be implied from the fact that costs were awarded against the present appellants in this Court in the previous case. This argument is, I think, disposed of by the provisions of Order LV.B, r. 47. I cannot draw any inference as to any agreement between the parties with regard to the costs before the arbitrator from the fact that one party applies to this Court for such costs of an appeal as the rules allow this Court to give. So far as the Arbitration Act itself is concerned, it clearly by s. 23, which applies the Act to arbitrations in which the Crown is concerned, at the same time negatives the right to award costs by providing that nothing in the Act shall affect the law as to costs payable by the Crown. So far as the position of the arbitrator in relation to the costs of his award is concerned, he is not without protection, as he would have the right that an arbitrator always has either of requiring an agreement between the parties as to those costs before undertaking the arbitration, or requiring payment before issuing his award.

For these reasons I think that the appeal fails on both grounds and must be dismissed with costs.

WARRINGTON L.J. This is an appeal under the Indemnity Act, 1920, on two points of law arising on the award dated September 14, 1925, of the arbitrator appointed to ascertain the compensation payable to the appellants in respect of their bacon, ham and lard requisitioned under reg. 2 F of the Defence of the Realm Regulations. The two points

are: (1.) Whether the arbitrator was entitled to take into account, as he has done, the requisition by the Food Controller of certain bacon, ham and lard under reg. 2 B of the Defence of the Realm Regulations as one of the circumstances existing at the time when the Food Controller requisitioned the appellants' goods under reg. 2 F, and (2.) Whether he was right in holding that he had no power to award costs. The arbitrator has found in fact that the effect of taking into account the requisition under 2 B has been to reduce the compensation payable to the appellants by 6000*l*. He has also stated that if he is wrong in his view as to costs he would award to the appellants their costs of the reference and direct the respondents to pay the costs of the award—namely, of an interim award and of the award now in question. Hence the present appeal. There is no cross-appeal on the part of the Crown.

In the month of August, 1919, the Food Controller, acting on behalf of the Crown, determined to obtain control over all imported bacon, ham and lard in the country on August 9, or to be discharged from the ship here after that date. For giving effect to this policy three steps were taken by the Food Controller: (1.) He requisitioned under reg. 2 B all stocks actually in the country on Saturday, August 9; (2.) He made an Order under reg. 2 F requiring every person having power to dispose of stocks which might be discharged from ship in Great Britain after August 9 to place the same at his disposal and to deliver the same to him or to his order; and (3.) He made an Order dated August 6 fixing maximum prices for purchasing and sale of imported bacon, ham and lard. That Order was with certain exceptions to come into effect on Monday, August 11. It has been already held by this Court and by the House of Lords that the arbitrator was bound to take into account the existence of the Prices Order as one of the circumstances affecting the amount of compensation payable to the appellants. The real question now raised is whether the requisition under reg. 2 B is to be treated as on the same footing for the purpose of assessing compensation as the Prices Order.

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The first two steps above mentioned were taken under different powers of the Controller and involved different consequences, and it is, therefore, necessary to state shortly what those powers were, how they were exercised and what were the consequences of the exercise thereof respectively. Under reg. 2 B the Food Controller had power to take possession of any food, and provisions were made for ascertaining, not the amount of compensation for the exercise of such power, but the price to be paid in respect of the goods so taken. The tribunal for ascertaining such price was the Defence of the Realm Losses Commission. The power was exercisable, and was in this case exercised by a circular letter dated August 8 addressed to persons having stocks under their control, and stating that the Food Controller in exercise of such power thereby took possession of all imported bacon, ham and lard, discharged from ship on or before August 9 and then held by the particular person or firm to whom the letter was addressed. The effect was that the property in and the possession of the goods actually passed to the Food Controller, and the Crown became liable for the prices to be ascertained in the prescribed manner. Reg. 2 F was of a different nature, and I will read the first two paragraphs so far as they are material without attempting to give a summary of their effect. "The Food Controller may make Orders regulating, or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of, or other dealing in, or measures to be taken in relation to any article (including Orders providing for the fixing of maximum and minimum prices) where it appears to him necessary or expedient to make any such Order for the purpose of encouraging or maintaining the food supply of the country, and making such provisions as to entry, inspection, or otherwise as appear to him necessary or expedient for the purpose of his duties." Then the second paragraph is the more important one. "The Food Controller may by Order require all or any persons owning or having power to sell or dispose of any article, or any stocks thereof, to place at the disposal of the Controller

the article, or the whole or any part of the stocks thereof, as may be directed by the Controller, on such terms as he may direct, and to deliver to the Controller or to any person or persons named by him the article or stocks in such quantities and at such times as the Controller may require, where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country. Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the Order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time." It was under para. 1 of this regulation that the Prices Order already mentioned was made. Under para. 2 the Order of August 8 above referred to was made. So far as it is material to the question it was as follows: "The Food Controller hereby requires every person owning or having power to dispose of any bacon, ham or lard which may be discharged from ship in Great Britain after 9th August, 1919, to place the same at the disposal of the Food Controller and deliver the same to him or to his order." By para. 1 (*b*) it was provided that the arbitrator to determine the compensation to be paid for goods discharged in England or Wales should be appointed by the Lord Chancellor. Mr. A. T. Miller K.C. was in due course appointed. The Order therefore does not of itself effect any transfer of either the possession of or the property in the goods referred to. It interferes with the freedom of disposition which the persons affected would otherwise possess, and the consequent payment to them is quite properly and logically treated not as the price of goods compulsorily purchased, but as compensation for such interference. Is then the fact that in consequence of the requisition under 2 B there were at the disposal of the Food Controller certain stocks of bacon, ham and lard besides those covered by the Order giving rise to compensation, a

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circumstance which the arbitrator is entitled to take into account in assessing compensation? In addressing the House of Lords on the previous occasion in reference to the Prices Order the Lord Chancellor said: "In any case I find it difficult to understand how the arbitrator can have been right in proposing to base his award upon the prices ruling before the goods were requisitioned, and at a time when they could not possibly have been sold. His duty was to ascertain what, if not requisitioned, they would have produced to the owner under all the conditions which existed at the time when they would have been sold; and among these conditions would have been the existence of the statutory maximum prices." Read literally this passage seems to me clearly to cover the case before the Court. If these goods had not been requisitioned and the appellants had been left free to dispose of them as they pleased an element in the value to them of that freedom was I think the fact that certain goods of the same description were in the hands of the Food Controller, who would possibly or perhaps probably dispose of them at prices which would depreciate the price of the goods in question. I can in fact in this respect draw no distinction in principle between the effect of the existence of the Prices Order and the requisition under 2 B. But it is said that the requisition under 2 B and the Order under 2 F cannot for this purpose be separated, and that if it is right—and this is conceded—for the purpose of ascertaining the compensation for the effect of the interference with the appellants' free right to dispose of their goods, to ignore the existence of the Order under 2 F, so also should the requisition under 2 B be ignored, for that the two together constitute one scheme of expropriation. I cannot accept this contention. In my opinion if the requisition under 2 B and the Order under 2 F are to be regarded as inseparable, then in my opinion the Prices Order should also be treated as inseparable from them. If the entire transaction is to be treated as one scheme I fail to see why the Prices Order is not a part of it. But so to hold would be to decide contrary to the decision of the House of Lords,

by which, of course, we are bound. But independently of this consideration I am unable to say that the two proceedings are to be treated as being together the expropriation giving rise to compensation. In the first place, whether certain steps together form one scheme is a question of fact: see per Lord Buckmaster in *Fraser* v. *City of Fraserville* (1), and the arbitrator in the present case has certainly not found that the steps taken by the Food Controller did form such a scheme. But putting this aside I am prepared to say that there is nothing in law which prevents one treating as separate and independent two steps so different in their nature and effects as are those in the present case. In the case of the goods under 2 B there is an actual and immediate expropriation at a price not arrived at by the higgling of the market, but by resort to the order of a tribunal. In the case of the goods in question under 2 F there is no immediate expropriation, but an interference with the free right of the owner of the goods to dispose of them as he pleases, giving a corresponding right to compensation. There is nothing to my mind illogical or improper in ignoring the Order which gives rise to compensation and yet treating as a material circumstance the requisition under 2 B. The latter had actually taken effect before there were any goods affected by the former. They were no doubt prompted by the same motives of policy, but I do not see that this necessarily makes them inseparable as one entire scheme. In truth, however, my decision rests upon this, that I can see no distinction between the Prices Order and the fact that certain goods were in the possession of the Food Controller under his requisition. The arbitrator has been held bound to have regard to the former, and in my opinion it follows that he is entitled to take the latter into account as one of the conditions affecting the value to the appellants of their right, but for the Order under 2 F, to dispose of their goods as they pleased.

I now turn to the other question: was the arbitrator right in holding that he had no power to award costs? In answering this question it is important to bear in mind the nature

(1) [1917] A. C. 187, 194.

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of the proceedings. We have to deal with the power to award costs in an arbitration, not in an ordinary litigation before the King's Courts. To such a case I do not think the familiar rule as to costs where the Crown is a party applies. Before the Arbitration Act the power of the arbitrator to award costs depended on the terms of the submission, and neither the Crown nor any other litigant could be directed to pay costs in the absence of agreement. The Act of 1889 contains a provision in s. 2 that a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to the Act, amongst which is a provision enabling the arbitrator to award costs. The Act also provides by s. 24 that it shall apply to every arbitration under an Act as if the arbitration were pursuant to a submission with an irrelevant exception. This arbitration is in my opinion an arbitration under an Act, being directed by a regulation which derives its validity from an Act. But it is provided that nothing in the Act shall affect the law as to costs payable by the Crown. The result is that in my opinion as regards the Crown the law remains unaltered, and the arbitrator has no power to make any Order as to costs affecting the Crown without its consent.

But it has been contended that inasmuch as the Crown obtained on the previous appeal an Order from this Court as to costs, it must be treated as having placed itself in the position of an ordinary litigant, and cannot rely on its exceptional position under the Arbitration Act. I cannot accede to this argument. The Crown was bound by the Indemnity Act, which gave a right of appeal to this Court in accordance with the conditions prescribed by Rules of Court. By these rules this Court has power to award costs, and in my opinion their Order as to costs was properly made under powers binding the Crown, and is no evidence of any agreement by the Crown to be treated as an ordinary litigant.

As to the contention, founded on s. 2, sub-s. 6, of the Indemnity Act, expressly conferring on the tribunals there mentioned the power of awarding costs, that the Court ought as a matter of construction to extend that provision to the

arbitrator, I can see no ground for inserting in the Act a provision which is not there, whether we think the omission was accidental or not.

On the whole in my opinion the appeal fails and should be dismissed with costs.

ATKIN L.J. This is an appeal on a point of law from an arbitrator who sat to assess compensation for bacon requisitioned by the Food Controller in August, 1919, under reg. 2 F of the Defence of the Realm Regulations. The arbitrator was appointed by the Lord Chancellor pursuant to the Order of requisition, and derives his jurisdiction from the Indemnity Act, 1920. In order to appreciate this point of law it is necessary shortly to state the facts. In March, 1919, the Food Controller ceased to control bacon, in the sense that he ceased to take or keep possession of it and to distribute it. He continued to maintain a control over prices by a continuous series of Orders fixing the Maximum Price at which bacon could be retailed. In June, 1919, for reasons which it is unnecessary to consider, he was contemplating resuming control of bacon, and in August control was resumed. The Defence of the Realm Regulations at this time were in full force as far as the Food Controller's powers were concerned. He had power to effect his purpose under two regulations. Under reg. 2 B he had the power, originally conferred on the Admiralty and Army Council, to take possession of any food. When he did so take possession of food he had to pay a price to be determined in default of agreement by the Defence of the Realm War Losses Commission on principles therein mentioned. Under reg. 2 F he might make Orders giving directions with regard to the distribution, supply, sale or purchase of or other dealing in any article, and by Order might require any person owning any stocks of any article to place at his disposal the whole or any part thereof. The regulation provided that such compensation should be paid for any article or stock so requisitioned, and should in default of agreement be determined by a single arbitrator; but in determining the amount of the compensation the

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arbitrator should have regard to the cost of production of the article and to the allowance of a reasonable profit without necessarily taking into consideration the market price of the article at the time. The resumption of control by the Food Controller made it necessary in his judgment not only to secure the whole of the existing stocks of bacon in this country, but also the stocks that would be landed from day to day in the immediate future. It is unnecessary to say that then, as now, the maintenance of the supplies of bacon in this country depended upon large imports, especially from the United States. The Food Controller could have used the powers under reg. 2 F to secure possession of both existing and future bacon. By existing I mean bacon then in the country. He chose to take possession of existing bacon under 2 B, while he secured possession of future bacon by an Order under 2 F. The reason probably is that he expected to pay less under a price fixed by the Defence of the Realm Losses Commission pursuant to 2 B than under compensation fixed by an arbitrator pursuant to 2 F, but the reason is immaterial. The scheme was one scheme brought into force at the same time and dependent on a distribution scheme, which made no distinction between the bacon taken under 2 B or 2 F. For obvious business reasons it was necessary to secure both existing and future bacon, and neither alone would have satisfied the essential requirements of the Food Controller.

The present question arises in respect of a large quantity of bacon belonging to the claimants and requisitioned under 2 F. Provisional amounts, exceeding 2,000,000*l.*, were paid to the claimants, who are large factors in the United States. The final determination of the compensation payable was referred to Mr. Miller K.C., the arbitrator appointed, as the Food Controller's Order provided, by the Lord Chancellor. An interim award of the arbitrator raised the question whether in assessing the compensation the arbitrator was to have regard to the Maximum Prices Order under which the requisitioned bacon was in fact sold. The House of Lords, affirming the Court of Appeal, held that he could not award

compensation on a value which exceeded the maximum prices so fixed. The Lord Chancellor expressly held that the Maximum Prices Order was independent of the requisition scheme; he took the view that the requisition Order was made "in order that the purpose and object of the Prices Order which was to ensure the supply to the public of food at reasonable prices might not be defeated by the holding up of stocks or the imposition of prohibitive wholesale prices": *Swift* v. *Board of Trade.* (1) The case therefore came back to the arbitrator, who has now made his final award, awarding to the claimants a sum of 179,000*l.* in addition to the sum of 2,110,651*l.* provisionally paid to them. In the course of the hearing counsel for the Board of Trade formulated in writing points of law for the ruling of the arbitrator, of which the first alone arises here. "1. That among other conditions existing at the time when the Food Controller requisitioned under D. R. R. '2 F' the claimants' goods or part thereof and which would have affected their realisation apart from such requisition were the following: (A) The requisition of hog products by the Food Controller on the 9th August, 1919, under D. R. R. '2 B,' and the circumstance that such goods were thereafter at his disposal." Upon that contention the arbitrator awards as follows. He says: "On the specific questions submitted . . . . so far as they are decisions of fact I find and so far as they are decisions of law I hold as follows: Question 1 (A): The Food Controller on the 9th August, 1919, requisitioned bacon, ham and lard under Defence of the Realm Regulations '2 B,' and I hold that I should take into account and I have taken into account such requisition as one of the circumstances existing at the time when the Food Controller requisitioned the claimants' goods under Defence of the Realm Regulation '2 F.' If I am held to be wrong in so deciding, and the compensation for the claimants' 2 F goods has to be assessed upon the assumption that there was no requisitioning of hog products by the Food Controller either under Regulation '2 F' or under Regulation '2 B,' I am of opinion that the claimants would

(1) [1925] A. C. 520.

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have been in a position to realise their 2 F goods to better advantage, and I assess the increase in the compensation which would in that event be payable to the claimants at the sum of six thousand pounds (6000*l.*) together with a corresponding increase in the interest awarded in paragraph 2 hereof." The question is as to the hypothesis upon which compensation is to be assessed. I see no reason for departing from the principles now well established upon which compensation has always been assessed where property has been compulsorily acquired for public purposes. I find the principles best expressed in two relatively recent decisions of the Privy Council, which are all the more valuable, as they apply principles relating to property acquired under English statutes to property acquired under Dominion statutes. The first is the *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste.* (1) The judgment is the judgment of the Privy Council, the members of the Judicial Committee being Lord Dunedin, Lord Atkinson and Lord Shaw. The judgment, which was delivered by Lord Dunedin, contained the following passage: "The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* (2), where Vaughan Williams and Fletcher Moulton L.JJ. deal with the whole subject exhaustively and accurately. For the present purpose it may be sufficient to state two brief propositions: (1.) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2.) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton L.J. in the case cited, is really

(1) [1914] A. C. 569. (2) [1909] 1 K. B. 16.

rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility." The other passage is in *Fraser* v. *City of Fraserville* (1), where the Judicial Committee consisted of Lord Haldane, Lord Buckmaster, Lord Dunedin, Lord Parker of Waddington, and Sir Arthur Channell. The judgment of the Privy Council was read by Lord Buckmaster, and in the course of it he said: "The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board* (2); *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3); and *Sidney* v. *North Eastern Ry. Co.* (4) The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported." I have already dealt with the scheme and the finding by the Lord Chancellor in respect of it. The arbitrator's view that there was a single scheme is obvious from his interim award: paras. (J) and (Q) to be found in the Appendix of the House of Lords proceedings, pp. 1262 and 1263. In these circumstances it appears to me impossible to accept the arbitrator's award on

(1) [1917] A. C. 187, 194.
(2) [1903] 1 K. B. 16.
(3) [1914] A. C. 576.
(4) [1914] 3 K. B. 629.

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this point as consistent with the rule in *Cedars Rapids Co.* v. *Lacoste* (1), that the "price must be tested by the imaginary market which would have ruled had the land"—substitute "bacon"—"been exposed for sale before any undertakers had secured the powers or acquired the other subjects which made the undertaking as a whole a realised possibility." The other subjects which made the undertaking as a whole a realized possibility were in this case the bacon requisitioned from other factors under 2 F and the existing bacon requisitioned under 2 B. Counsel for the respondents had in fact conceded below and did concede before us that the other bacon requisitioned under 2 F was not to be taken into account. But they made this concession with considerable uneasiness and with professions of generosity. They obviously felt the difficulty of distinguishing between the two, and apparently were prepared, if tempted, to depart from their generous mood to contend that in law all other 2 F bacon should be taken into account. They pressed before us and before the arbitrator that he and we were bound by the decision of the House of Lords, or, at any rate, by the express opinion of the Lord Chancellor, to decide in favour of their view. For they contended the Lord Chancellor had said that the arbitrator's "duty was to ascertain what, if not requisitioned, they (the goods) would have produced to the owner under all conditions which existed at the time when they would have been sold; and among those conditions would have been the existence of the Statutory Maximum Prices." (2) Another condition would have been, so they say, the existence of bacon requisitioned under 2 B, to which may be added the existence of other bacon requisitioned under 2 F. I venture to prophesy that this argument will loss considerable force, if put forward at all, in the ultimate tribunal. The Lord Chancellor was well aware of the rules dealing with compensation on compulsory acquisition of property as expressed in the English Courts and in the Privy Council in the cases I have cited. I have no doubt that by the conditions existing "if not requisitioned," he meant precisely the same thing as

(1) [1914] A. C. 576. (2) [1925] A. C. 531.

Lord Dunedin in *Cedars Rapids Co.* v. *Lacoste* by the imaginary market before the undertakers had acquired the other subjects which made the undertaking as a whole a realized possibility. Any other view would mean that if the Food Controller had acquired the 2 B or the 2 F bacon to give away or to sell at less than cost the claimants would only have recovered compensation on the footing of the prices at which they could have sold their bacon in competition with the gratuitous or artificially cheapened bacon. On the other hand it would mean that if the Food Controller had acquired the 2 B or 2 F bacon for export the claimants could claim the benefit of prices based on unrestricted competition tempered only by a Maximum Prices Order if there happened to be one. The contention of the respondents in this case seems to me to cut across every established principle upon which compensation for compulsory purchase has been estimated according to our law. I see no reason for suggesting that any variation in established doctrine has been introduced by the Defence of the Realm Regulations other than variations expressly formulated. I think that the arbitrator should not have taken into account the requisition of bacon under reg. 2 B as one of the circumstances existing at the time when the Food Controller requisitioned the claimants' goods under reg. 2 F. This is the only point of law raised on this part of the case, and as it ought to be answered in the claimants' favour the award ought to be increased as indicated by the arbitrator by 6000*l.*

The question of costs raises a different and as I think more difficult question. The jurisdiction of the arbitrator turns upon the effect of the Defence of the Realm Regulations, the Indemnity Act of 1920, and the Arbitration Act of 1889. In most cases the Indemnity Act by s. 1 took away any existing right to compensation or other relief in respect of acts done in defence of the realm. It substituted rights under s. 2 to have recourse to the tribunals there mentioned for the relief therein specified. It is not clear that s. 1 took away a right to go to arbitration, as the section appears to be confined to proceedings in any Court; but it seems to have

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affected the right to enforce any award in any arbitration falling otherwise within the terms of the section. Sect. 2, sub-ss. 1 and 4, give renewed statutory effect to the arbitration provisions under reg. 2 F. I think that the true view is that the arbitrator derives his jurisdiction from the Indemnity Act. In cases where the special tribunal prescribed by the Defence of the Realm Regulations is, as here, an arbitrator, the terms of the Arbitration Act apply by reason of s. 24 of that Act, and, therefore, the arbitrator, by reason of s. 2 and Sch. 1, sub-s. 1, has discretion over the costs of the reference and the award; but by the terms of s. 23 nothing in the Act is to affect the law as to costs payable by the Crown. The powers of an arbitrator as to costs in a proceeding where the Crown is a party seem to me to be precisely those of a judge in such a proceeding. The latter derives his power as to costs from the Judicature Act and Rules, but those powers similarly do not affect the law as to costs payable by the Crown: see *In re Carbonit Aktiengesellschaft.* (1) There is no restriction of the powers of the arbitrator as to costs in comparison with the powers of a judge. Sect. 23 merely saves the rights of the Crown, whatever they may be. This introduces a topic of perennial controversy. If a suggestion in *Rex* v. *Archbishop of Canterbury* (2) were adopted as authoritative, the dispute would be simplified. It is there suggested (3), as incidental to departmental administration, there must often be litigation which does not directly affect any prerogative of the Crown, and as to which no good reason can be assigned for the denial of costs to the successful party; and the case of *Moore* v. *Smith* (4) supports this view. The present proceedings would come within the class of litigation there mentioned; but the Court in that case expressly refrained from deciding the question, and I do not think it necessary to decide the matter there left open. It appears to be always a question whether any particular legislation has intended to give a particular tribunal in particular cases power to grant costs against the Crown. Upon this view

(1) [1924] 2 Ch. 53.
(2) [1902] 2 K. B. 503.
(3) [1902] 2 K. B. 572.
(4) (1859) 1 E. & E. 597.

the Court of Appeal in the present proceedings gave the Crown the costs of the claimants' appeal from the interim award of the arbitrator. The Solicitor-General argued before us that the effect of Order LV.B, rr. 39–48, dealing with appeals under the Indemnity Act, and incorporating the rules of Order LVIII., was to give the Court of Appeal an express power to order costs against the Crown, though there was no express reference to costs in Order LV.B, and the power incorporated was, under Order LVIII., r. 4, a general power, which, as I have said, in itself, like the power given to an arbitrator, does not affect the law as to costs payable by the Crown. It appears to me that precisely the same reasoning gives the power over costs to the tribunal of first instance as it does to the appellate tribunal. The Indemnity Act, by s. 2, is dealing with claims in proceedings to which it may be taken for practical purposes the Crown always must be a party. There are only three classes of tribunals mentioned to whom jurisdiction over such claims is by the Act given: The Board of Arbitration appointed to award compensation for the requisition of ships, the War Compensation Court, and special tribunals fixed by the Defence of the Realm Regulations, who appear to me to be in all cases arbitral tribunals, either designated or to be nominated in manner provided. The two former tribunals, by s. 2, sub-s. 6, are given express power to deal with costs, that is, to give costs for or against the Crown. It appears to me that where the third class of tribunal has already statutory powers to deal with costs, the plain meaning of the Legislature is that that class of tribunal should be at liberty to exercise its discretion over costs in the proceedings referred to it, which can only mean have a discretion to award costs for or against the Crown. It may fortify this construction to point out that unless this is true the arbitrator has no power to deal with the costs of the award, including his own remuneration. On a consensual submission before the Arbitration Act not conferring express power over costs upon the arbitrator, there is authority for saying that a term could be implied that each party agreed to pay half the costs of the award. But under the Defence

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of the Realm Regulations and the Indemnity Act submissions are not consensual; there is no scope for contract. Any term, therefore, must be implied in the Act; and the Solicitor-General conceded that such a term at least should be implied. If there is room for any implication there appears to me no reason why the implication should not extend to granting full discretion over costs. It becomes unnecessary, in the view that I take as to the arbitrator's powers over costs, to consider the alternative view based upon the contention that as the Crown in the Court of Appeal obtained an order for costs, proceeded to taxation, and eventually deducted them from the award, the Crown indicated, with the consent of the claimants, that it was prepared in this litigation to be dealt with as a private litigant: see *In re Carbonit Aktiengesellschaft.* (1) It is sufficient to say that unless the argument from Order LV.B has the full scope above assigned to it, there seems to me considerable support for this alternative suggestion. For the reasons, however, already given, I think that the costs were in the discretion of the arbitrator, and that effect should be given to his award on this footing as stated by him.

Appeal dismissed on both grounds.
Leave to appeal to the House of Lords.

Solicitors for the appellants: *Rawle, Johnstone & Co., for Alsop, Stevens & Crooks, Liverpool.*

Solicitor for the respondents: *Solicitor to the Board of Trade.*

(1) [1924] 2 Ch. 53.

J. F. C.

Applied. HARRIS *v.* HARRIS. [1949] 2 All E.R. 318.

PEAGRAM *v.* PEAGRAM.

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April 20, 21.

Husband and Wife—Maintenance Order—Order made in Australia—Confirmation by Justices in England—Jurisdiction to modify Amount payable—Appeal by Case stated—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 11—*Maintenance Orders (Facilities for Enforcement) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 33), *ss.* 1, 4, 7.

A married woman obtained in a police court in Australia a maintenance order against her husband ordering him to pay 5*l.* 10*s.* per week for her and her child's maintenance. An application was subsequently made by her to a Court of summary jurisdiction in England under the Maintenance Orders (Facilities for Enforcement) Act, 1920, to confirm that order as against her husband who was resident in England. Upon that application no evidence was submitted to the justices on behalf of the husband. The justices confirmed the order with the modification or variation of substituting 2*l.* 10*s.* per week—i.e., 2*l.* for the married woman and 10*s.* for the child—in lieu of 5*l.* 10*s.* per week, they being of opinion that they were bound to reduce the amount payable under the order to the limit prescribed for such orders made by a Court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895 :—

Held (1.), distinguishing *Manders* v. *Manders* [1897] 1 Q. B. 474, that the justices had power to state a case for the opinion of the King's Bench Division on the question whether they were right in so deciding, and (2.) that they were wrong in holding that in dealing with an order under the Maintenance Orders (Facilities for Enforcement) Act, 1920, they were bound to limit the amount payable to the sum prescribed for orders made under the Summary Jurisdiction (Married Women) Act, 1895.

Per Avory J.: The expression "the Summary Jurisdiction Acts" in s. 7 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, does not include the Summary Jurisdiction (Married Women) Act, 1895.

CASE stated by Devonshire justices.

At a Court of summary jurisdiction sitting at Okehampton, Horace Lewis Peagram (hereinafter called "the respondent") was summoned, at the instance of his wife, Charlotte Ada Peagram (hereinafter called "the appellant"), in pursuance of the Maintenance Orders (Facilities for Enforcement) Act, 1920, to show cause why an order dated July 24, 1925, made by the police court, Adelaide, South Australia, ordering him to pay 5*l.* 10*s.* per week for the maintenance of the appellant and her child, should not be confirmed.

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At the hearing on November 11, 1925, the following facts were proved or admitted :—

On November 16, 1923, at the police court, Adelaide, South Australia, an order under the Married Women's Protection Act, 1896 (Australia), was made directing the respondent to pay 2*l.* per week for the maintenance of the appellant and her child, whose custody was granted to her; and on April 9, 1924, justices sitting at Okehampton, Devonshire, confirmed the said order under the Maintenance Orders (Facilities for Enforcement) Act, 1920. On July 24, 1925, on an application by the appellant under the Australian Act of 1896, the police court, Adelaide, varied the first order, and provisionally ordered the respondent to pay 5*l.* 10*s.* per week in lieu of 2*l.* per week.

No evidence was submitted to the justices by the respondent.

For the appellant it was contended that the justices were empowered under the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 4, sub-s. 4, to confirm the order directing the respondent to pay 5*l.* 10*s.* per week without modification or variation.

For the respondent it was contended that the justices had power under s. 3 and s. 4, sub-ss. 4 and 6, of the said Act of 1920, to confirm the order with such modification or variation as they might think fit, and, further, that the fact that under s. 4, sub-s. 7, the respondent was given the same right of appeal as if the order had originally been made in the Court of summary jurisdiction, showed that any confirmation should be subject to such modification or variation as might be necessary to keep the weekly payments within the limits prescribed by English law, and that the following statement in a Home Office circular dated June 15, 1925 (which circular was put in evidence): "The Secretary of State is advised that any 'variation' of an order which has been confirmed under s. 4 must be confined within the limits of English law, e.g., the amount payable to a wife for her maintenance must not exceed 40*s.* a week," should be accepted by the justices as correct, subject only to the increase of the sum of 2*l.* there mentioned to 2*l.* 10*s.*, the additional 10*s.*

being payable under the Married Women (Maintenance) Act, 1920, in respect of the appellant's child.

The justices confirmed the order of July 24, 1925, with the modification or variation of substituting 2*l.* 10*s.* per week in lieu of 5*l.* 10*s.* per week, they being of opinion that the meaning of s. 4 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, was that they should modify or vary such an order by reducing it to the limit prescribed for such orders made in a Court of summary jurisdiction in England against a respondent residing in England, and that they were justified in following the advice tendered to the Secretary of State as contained in the Home Office circular.

The question was whether the justices were right in so holding.

St. J. G. Micklethwait for the appellant.

[LORD HEWART C.J. Has this appeal been rightly brought to the King's Bench Division? Does the appeal in such a case not lie to the Probate Division under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895? (1)]

J. L. Pratt for the respondent. I take that preliminary objection to the hearing of the appeal.

Micklethwait. This is a case not under the Summary Jurisdiction (Married Women) Act, 1895, but under the Maintenance Orders (Facilities for Enforcement) Act, 1920. (2)

(1) Summary Jurisdiction (Married Women) Act, 1895, s. 11:—

"Save as is hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a Court of summary jurisdiction under this Act to the Probate, Divorce, and Admiralty Division of the High Court of Justice. . . . ."

(2) Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 1, provides for the enforcement in England of maintenance orders made in His Majesty's dominions outside the United Kingdom.

Sect. 4, sub-s. 1: "Where a maintenance order has been made by a Court in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, and the order is provisional only and has no effect unless and until confirmed by a Court of summary jurisdiction in England . . . . , and a certified copy of the order, together with the depositions of witnesses and a statement of the grounds on which the order might have been opposed has been transmitted to the Secretary of State, and it appears to the Secretary of State that the person against whom the order was made is resident in England . . . . , the Secretary of

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While it would seem that under s. 4, sub-s. 7, of the latter Act, the husband, as the person bound by the order, would, if he desired to appeal against the order, have to appeal to the Probate Division by virtue of s. 11 of the Act of 1895, s. 4, sub-s. 7, does not apply to the case of an appeal by the wife against the refusal of the justices to confirm the order; her appeal is therefore rightly brought to this Court under s. 33 of the Summary Jurisdiction Act, 1879, by case stated. The expression "the Summary Jurisdiction Acts" in s. 7 of the Act of 1920 does not include the Summary Jurisdiction (Married Women) Act, 1895, which does not come within the definition of "Summary Jurisdiction Acts" in s. 13, para. 10, of the Interpretation Act, 1889. Under the Summary Jurisdiction Acts there may be an appeal by case stated and also an appeal to quarter sessions, whereas under the Act of 1895 the only appeal is to the Probate Division,

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State may send the said documents to the prescribed officer of a Court of summary jurisdiction, with a requisition that a summons be issued calling upon the person to show cause why that order should not be confirmed, and upon receipt of such documents and requisition the Court shall issue such a summons and cause it to be served upon such person."

Sub-s. 3: "At the hearing it shall be open to the person on whom the summons was served to raise any defence which he might have raised in the original proceedings had he been a party thereto, but no other defence, and the certificate from the Court which made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken."

Sub-s. 4: "If at the hearing the person served with the summons does not appear or, on appearing, fails to satisfy the Court that the order ought not to be confirmed, the Court may confirm the order either without modification or with such modifications as to the Court after hearing the evidence may seem just."

Sub-s. 6: "Where a provisional order has been confirmed under this section, it may be varied or rescinded in like manner as if it had originally been made by the confirming Court. . . . ."

Sub-s. 7: "Where an order has been so confirmed, the person bound thereby shall have the same right of appeal, if any, against the confirmation of the order as he would have had against the making of the order had the order been an order made by the Court confirming the order."

Sect. 7: "The Summary Jurisdiction Acts shall apply to proceedings before Courts of summary jurisdiction under this Act in like manner as they apply to proceedings under those Acts. . . . ."

and it has been decided that the justices cannot under that Act state a case for the opinion of this Court: *Manders* v. *Manders*. (1) That case has no application here. It was considered and distinguished in *Ruther* v. *Ruther* (2), where it was decided that justices had power to state a case for the opinion of the King's Bench Division on an information or complaint by a married woman alleging that payments due to her from her husband under an order made under the Act of 1895 were in arrear. Lord Alverstone C.J. there pointed out that if the question involved had been raised by certiorari there could have been no objection to the proceedings. So, too, in this case if the justices' decision on the order made in Australia had been brought up on certiorari this Court would have entertained the matter. The constitutional right of this Court to control the decisions of inferior Courts cannot be cut down unless by express enactment. Here the justices exceeded their jurisdiction in making the order they did, their function being, in the absence of evidence entitling them to modify the order, to confirm the provisional order simpliciter.

[AVORY J. referred to Willes J.'s judgment in *Power* v. *Wigmore*. (3)]

J. L. Pratt for the respondent. *Manders* v. *Manders* (1) supports the respondent's contention that there is no right of appeal in this case by way of case stated, inasmuch as the Summary Jurisdiction (Married Women) Act, 1895, comes within the expression "the Summary Jurisdiction Acts" in s. 7 of the Act of 1920. The provisional order was confirmed by the justices with modifications, whereupon it became binding on both husband and wife. It follows therefore that under s. 4, sub-s. 7, of the Act of 1920 an appeal, whether by the husband or wife, lies to the Probate Division, as in *Manders* v. *Manders*. (1)

Micklethwait replied.

LORD HEWART C.J. In this case the preliminary point arises whether this Court has the power to entertain the

(1) [1897] 1 Q. B. 474. (2) [1903] 2 K. B. 270.
(3) (1872) L. R. 7 C. P. 386.

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question raised by the case stated by the justices. It is urged that the Court has no such power, and that for two reasons—first, because of the decision in *Manders* v. *Manders* (1), where it was held that a Court of summary jurisdiction has no power to state a case for the opinion of this Court upon a point of law arising on an application for an order under the Summary Jurisdiction (Married Women) Act, 1895, the only mode in which in such a case the decision of the justices can be questioned being by appeal to the Probate Division under s. 11 of that Act. When one turns to that Act it is true that the Summary Jurisdiction Acts are referred to, but they are referred to for an extremely limited purpose. Sect. 8 of the Act of 1895 provides that "all applications under this Act shall be made in accordance with the Summary Jurisdiction Acts, and, in the case of a conviction of a husband for aggravated assault upon his wife, her application may, by leave of the Court, be made by summons to be issued and made returnable immediately upon such conviction." The Summary Jurisdiction Acts determine the mode in which applications are to be made. When that Act purports to deal with the question of appeal it provides clearly in s. 11 that "save as is hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a Court of summary jurisdiction under this Act to the Probate, Divorce, and Admiralty Division." To ascertain the meaning of the words "save as is hereinbefore provided" we have to look at the next preceding section, which says that "if in the opinion of a Court of summary jurisdiction the matters in question between the parties or any of them would be more conveniently dealt with by the High Court, the Court of summary jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the Court of summary jurisdiction: Provided always, that the High Court or a judge thereof shall have power by order in any proceeding in the High Court relating to or comprising the same subject matter as the application so refused as aforesaid, or any part thereof,

(1) 1 Q. B. 474.

to direct the Court of summary jurisdiction to rehear and determine the same." So far therefore as the Summary Jurisdiction (Married Women) Act, 1895, is concerned, a particular mode of appeal from an order or refusal of an order is pointed out. The structure of the Act with which we are now concerned is different. But here too, and this is the second argument which has been raised in support of the contention that this Court has no power to entertain the special case, there are certain provisions as to the mode of appeal. In particular by s. 4, sub-s. 7, " where an order " —that is under the Act of 1920—" has been so confirmed, the person bound thereby shall have the same right of appeal, if any, against the confirmation of the order as he would have had against the making of the order had the order been an order made by the Court confirming the order." It is said that if this Court of summary jurisdiction sitting in Devonshire had made an order against which the husband desired to appeal it would have been necessary for him to go to the Probate Division, and it is said, and said with some force, how can it be right that the husband, if he is aggrieved by an order, must go to the Probate Division while the wife, if she is dissatisfied in some such way as in this case, is entitled to come to the King's Bench Division by a special case? It is not necessary to consider whether the case of *Manders* v. *Manders* (1) was rightly decided, but two things are quite clear. First, that the judges who decided it deliberately expressed their doubts; for example, Wright J. begins his judgment with these words: " I am of opinion that the only appeal is that under s. 11 of the Act of 1895 to the Probate, Divorce and Admiralty Division, though it is extremely difficult to know whether that was what the Legislature intended, and I give my opinion with no great confidence." The second observation is that the present question is not the same as that which was considered in *Manders* v. *Manders*. (1) Sect. 7 of the statute with which we are now concerned provides that " the Summary Jurisdiction Acts shall apply to proceedings before Courts of

(1) [1897] 1 Q. B. 474, 477.

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summary jurisdiction under this Act in like manner as they apply to proceedings under those Acts." The real question therefore is this: is there anything in this Act or in the decided cases which takes away what is otherwise the undoubted right of a person aggrieved to take the opinion of the King's Bench Division by appeal in the form of a special case? The attention of the Court has been directed to the decision in *Ruther* v. *Ruther* (1)—a case heard six years after *Manders* v. *Manders* (2)—where Lord Alverstone C.J. said (3): "For the respondent reliance is placed upon the case of *Manders* v. *Manders* (2), and it was argued that the appeal ought to be to the Probate Division; but *Manders* v. *Manders* (2) was a case of an appeal from an order on a husband for a weekly payment made under the Act of 1895, whereas in this case the appellant is not appealing against the original order, but from the warrant of the magistrate committing him to prison for non-payment which is issued under the Bastardy Act, and is not an order such as is referred to in s. 11 of the Act of 1895. It is, moreover, quite clear that if the question involved in this case had been raised by certiorari, there could have been no objection to the proceedings." These observations, it seems to me, apply to the present matter. If this question had been raised by certiorari or in proceedings for a writ of mandamus it would have been proper for this Court to deal with it, the underlying principle being that this Court has jurisdiction unless by express words that jurisdiction has been taken away. There is a further point. We have been told enough of the nature of the controversy involved in the present case to know that this appeal by way of case stated is not an appeal simpliciter against the order made; it is rather an appeal upon a question of law, the appellant alleging that the justices so misdirected themselves as to the law which was applicable as in effect to decline jurisdiction. The case comes very near the class of cases where this Court has issued a writ of mandamus to justices to hear and determine

(1) [1903] 2 K. B. 270. (2) [1897] 1 Q. B. 474, 477.
(3) [1903] 2 K. B. 274.

a case which they have declined to entertain at all or, in entertaining it, have permitted their decision to be controlled by something extraneous and irrelevant, so that the result is as if they had not really entertained the matter at all. For these reasons I am not satisfied—I deliberately put it in that way—that there is anything in the Maintenance Orders (Facilities for Enforcement) Act, 1920, or in any decision of the Courts which takes away the jurisdiction of this Court to entertain the question raised by this special case. We ought therefore, I think, to hear it.

AVORY J. I am of the same opinion. The short question is whether the Maintenance Orders (Facilities for Enforcement) Act, 1920, the Summary Jurisdiction (Married Women) Act, 1895, or the decision of this Court in *Manders* v. *Manders* (1) have taken away the jurisdiction of this Court to entertain this special case. There is no question that the justices were a Court of summary jurisdiction; there is no question that they were in this case hearing and determining an information or complaint which they had power to determine in a summary way; and there is no doubt also that a point of law arose before them which they in fact determined. In these circumstances it is prima facie clear that the justices had the right to state a case for the opinion of this Court by virtue of s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879. So far as the Maintenance Orders (Facilities for Enforcement) Act, 1920, is concerned, I think that s. 7 of that Act in effect confirms the prima facie view that the justices were entitled to state this case, because it enacts that "the Summary Jurisdiction Acts shall apply to proceedings before Courts of summary jurisdiction under this Act in like manner as they apply to proceedings under those Acts." I have no doubt that the expression "the Summary Jurisdiction Acts" in that section means the Acts which form the code for regulating procedure of Courts of summary jurisdiction, beginning with the Summary Jurisdiction Act, 1848, and including the

(1) [1897] 1 Q. B. 474.

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Summary Jurisdiction Acts of 1879, 1884 and 1899, but in my opinion it does not include the Summary Jurisdiction (Married Women) Act, 1895, notwithstanding the title of that Act. Consequently, s. 7 itself, when applied to those Acts would, by incorporating the Summary Jurisdiction Act, 1879, give power to the justices to state a case upon any point of law arising before them.

We have also to consider the general question of the jurisdiction of this Court, and I do not think we are justified in holding that its jurisdiction has been ousted unless we find a decision or express words in a statute to that effect. The jurisdiction of this Court has been described in this way: where any tribunal, inferior Court, or body of persons charged with the performance of a public duty does not discharge the duty so imposed, mandamus will lie to compel it to perform the duty. If in this case the justices, instead of hearing any evidence tendered, had said, "We have a circular from the Home Office before us, and whatever the evidence may be we intend to hold that we have no power to make any order except such as we might make if the proceedings had commenced in England; in other words, we are bound by the circular to limit the amount which we can order, and therefore it is useless to ask us to hear any evidence to vary that amount" —and that is what in effect they ultimately said—the present appellant would have been entitled to come to this Court for a mandamus to the justices to hear and determine the matter according to law. Such a case would come within *Reg.* v. *Adamson* (1), where Cockburn C.J. said: "If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the Court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor-General has called our attention to evidence of such a description that I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extrajudicial which ought not to

(1) (1875) 1 Q. B. D. 201, 205.

have affected their decision, and which, it seems to me, was the same as declining jurisdiction." In this case I think it is clear that the justices in effect declined to exercise the jurisdiction conferred upon them by the Act of 1920, which expressly provides by s. 4, sub-s. 3, that "at the hearing it shall be open to the person on whom the summons was served to raise any defence which he might have raised in the original proceedings had he been a party thereto, but no other defence, and the certificate from the Court which made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken." It is clear in this case that this defence or answer, which was either put forward or was adopted ex mero motu by the justices, is not one of the defences open to the husband, the person summoned in this case. Therefore the justices in acting upon some suggested defence or answer to the claim which was not open in law were acting extrajudicially, and were in effect declining to exercise the jurisdiction conferred upon them by this statute.

I desire to add a word as to the decision in *Manders* v. *Manders*. (1) If the question before this Court were the same as in that case, that is to say, if the proceedings here had been under the Summary Jurisdiction (Married Women) Act, 1895, and not under the Maintenance Orders (Facilities for Enforcement) Act, 1920, we might, and probably would, have been obliged to say that we were bound by *Manders* v. *Manders* (1), while at the same time it would be open to us to say that we profoundly disagreed with it. To justify that observation I ought to say that it appears from the report of that case (2) that the Court there was under the impression that if they imported the provisions of the Summary Jurisdiction Act so as to give the right to state a case, it would follow that there would be a right to appeal to quarter sessions also imported, and the Court said "that cannot

(1) [1897] 1 Q. B. 474. (2) Ibid. 478.

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be a correct view, for there could not be an appeal to the Probate, Divorce and Admiralty Division side by side with an appeal to quarter sessions." In point of fact the importation of the Summary Jurisdiction Acts or any of them would not give a right of appeal to quarter sessions, because these Acts do not give a general right of appeal to quarter sessions, but only regulate the procedure upon an appeal to quarter sessions. But whatever would have been the result if the present case had been a proceeding under the Act of 1895, in my opinion *Manders* v. *Manders* (1) has no binding obligation in a case under the Act of 1920. It is not here necessary to follow or to differ from that decision. I agree that the justices were entitled to state this case, and that the Court is bound to hear it.

SHEARMAN J. After much doubt I have arrived at the conclusion that we are entitled to hear this case. I do not wish to say anything which may convey the impression that the general introduction in the Act of 1920 of a reference to the Summary Jurisdiction Acts gives an appeal to quarter sessions. Neither do I wish to use any language which may convey the impression that if the appeal is under s. 3, sub-s. 6, and s. 4, sub-s. 7, of this Act when the order is made in favour of a married woman against her husband the appeal does not lie to the Probate Division. This Act of 1920 applies not only to maintenance orders made in favour of a wife, but also to those made in favour of dependants: see s. 10. It is clear from the language used that some reference to the matrimonial Courts of England was in the mind of the framers of the statute. Sect. 1 shows that certain orders made abroad are to be registered in the matrimonial Court here, and s. 3, sub-s. 6, says that "the applicant shall have the same right of appeal, if any, against a refusal to make a provisional order as he would have had against a refusal to make the order had a summons been duly served on the person against whom the order is sought to be made." In my view the meaning of that is that the jurisdiction is the

(1) [1897] 1 Q. B. 474.

same as if in the case of a wife a maintenance order had been made under the Act of 1895. That is why I deliver my judgment with some doubt, because it seems to me that that imports an appeal to the Probate Division by reference to that Act.

Sect. 4, sub-s. 4, and sub-s. 7 must be read together. Sub-s. 4 says that "the Court may confirm the order either without modification or with such modifications as to the Court after hearing the evidence may seem just"; and sub-s. 7 says that: "Where an order has been so confirmed" —that is to say with or without modification—"the person bound thereby shall have the same right of appeal, if any, against the confirmation of the order as he would have had against the making of the order had the order been an order made by the Court confirming the order." It is possible that if the appeal is by a dependant it might not go to the matrimonial Court, but if the appeal is by a husband or wife it should be to that Court. I think it is an arguable point that as long as this Court is bound by *Manders* v. *Manders* (1) an appeal as between husband and wife is to the Probate Division, and to that Court only. But when I look at that decision I find that it was put upon the ground that there was in the Act of 1895 a general incorporation of the Summary Jurisdiction Acts. Wright J. said that the reference to those Acts was carefully limited. In the Act with which we are concerned the reference is not limited; and although the matter is by no means clear, I think there is jurisdiction in this Court to hear a case which is really stated by the justices in the nature of a consultative case. Although *Manders* v. *Manders* (1) has decided that that does not apply to proceedings under the Act of 1895, the Act which we are considering has a different purview and is dealing with different matters. I do not think that *Manders* v. *Manders* (1) is to be applied except to cases under the Act of 1895. While I think therefore that we are entitled to consider a case stated by the justices under this Act before they arrive at their decision, I do not purport to decide questions which may have to be

(1) [1897] 1 Q. B. 474.

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argued elsewhere, and I express the view with some doubt that after the justices have given their decision an appeal lies to the Probate Division when it is an application by the wife against the husband.

Preliminary objection overruled.

The appeal was then heard on the merits.

Micklethwait for the appellant. The justices misdirected themselves in holding that in confirming the provisional order they were bound to modify it by substituting 2*l.* 10*s.* per week for the amount of 5*l.* 10*s.* ordered by the Australian Court. Such a decision is based upon a complete misconception of the purpose of the Act of 1920, which is to provide for the enforcement in this country of orders duly made in the dominions. Moreover, the justices had no evidence upon which they could modify the order, and they confused the stage of confirmation with the subsequent stage of variation. The Home Office circular upon which they purported to act was misunderstood by them.

J. L. Pratt for the respondent. The jurisdiction of Courts of summary jurisdiction in England to make maintenance orders in favour of a wife is limited to an amount not exceeding 2*l.* per week; and if Parliament had intended by the Act of 1920 to place upon a husband resident in England a greater burden and to allow Courts of summary jurisdiction to enforce that new liability, it would have done so in unmistakable language. It is submitted that the justices cannot confirm an order without reducing the amount to 2*l.* by virtue of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. If the justices in this case confirmed the order for 5*l.* 10*s.* the respondent might immediately afterwards satisfy them that he could only pay 2*l.* per week, and they would be bound to vary it accordingly.

LORD HEWART C.J. In this case the question is whether the justices rightly interpreted certain of the provisions of the Maintenance Orders (Facilities for Enforcement) Act, 1920. The case came before them upon an information

preferred by the appellant against her husband summoning him to show cause why the order made in the Adelaide police court ordering him to pay 5*l.* 10*s.* per week to the appellant and her child should not be confirmed, either without modification or with such modification as to the justices might seem just. The scheme of the Act of 1920 is reasonably clear. It is an Act to facilitate the enforcement in England of maintenance orders made in other parts of His Majesty's dominions and protectorates and vice versa. It is a reciprocal scheme entered into by this country and His Majesty's dominions and protectorates: see s. 1, sub-s. 1, of the Act. Sect. 4, sub-s. 1, provides that where a maintenance order has been made by a Court in His Majesty's dominions outside the United Kingdom and the order is provisional only and of no effect unless and until confirmed by a Court of summary jurisdiction in this country, and a certified copy of the order has been transmitted to the Secretary of State, and it appears to him that the person against whom the order is made is resident in this country, the Secretary of State may send the document to a Court of summary jurisdiction with a requisition that a summons be issued calling upon the person to show cause why the order should not be confirmed, whereupon a summons is to issue. Then there follows in sub-s. 3 of the same section the provision that it shall be open to the person served with the summons to raise any defence that might have been raised in the original proceedings, but no other defence. These various steps having been taken, what is the task of the Court of summary jurisdiction? The statute draws a perfectly clear distinction between the original task of confirmation and the subsequent task, if it should arise, of variation or rescission. Sect. 4, sub-s. 4, says this: "If at the hearing the person served with the summons does not appear or, on appearing, fails to satisfy the Court that the order ought not to be confirmed, the Court may confirm the order either without modification or with such modifications as to the Court after hearing the evidence may seem just." The respondent to the summons has therefore an opportunity of showing that the Court ought not to confirm

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the order at all, being limited, however, in that opportunity by the grounds which he might have taken as a party in the original Court. But if the Court is to confirm the order the only limit which is set to the modifications which may be made is that they must be such "as to the Court after hearing the evidence may seem just." Then sub-s. 6 deals with a totally different and later stage, the stage where the order having been confirmed, with or without modifications, it is desired to rescind or to vary it. The argument based upon this provision, which the justices accepted, seems to have been twofold: it began by mixing up the modifications which may take place in the original task of confirming the order with the variation which, subject to certain conditions, may afterwards be made in an order already confirmed; and the argument proceeds to contend that upon any variation the figure in this case—5*l.* 10*s.*—must be reduced without regard to any evidence at all to a figure of 2*l.*, because of the provision of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. In this case no evidence was offered by the respondent, and all that was put forward on his behalf was a universal proposition of law that in no case could the sum of 2*l.* a week be exceeded. For the purpose of re-enforcing that contention reference was made to a Home Office circular, with regard to which three blunders seem to have been committed, not at all fair to the circular. In the first place the circular was treated as being evidence, which it is not, or a statement of the law, which it is not; in the second place what it says as to the subsequent variation is treated as if it referred to the original confirmation; and in the third place what it says about the subsequent variation is wholly misunderstood. The argument which has been repeated to-day is that upon the subsequent variation, and for this purpose the variation is treated as if it were the original modification, there is a maximum limit of 2*l.* That argument is based upon the words of s. 4, sub-s. 6, of the Act of 1920, and s. 7 of the Act of 1895. What is it that s. 7 provides? It enacts that "a Court of summary jurisdiction acting within the . . . . petty sessional or other division or district, in which any

order under this Act or the Acts mentioned in the schedule hereto . . . . has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of 2*l*. . . . ." To ascertain the meaning of that section it is necessary to remember that the particular orders with which it was dealing in 1895 were orders which could not exceed the weekly sum of 2*l*., and, therefore, when the limitation of that maximum is inserted the meaning is that upon such alteration or variation of an order in which the sum named is less than 2*l*. it may not be increased to a sum exceeding 2*l*. The argument now is that because by s. 4, sub-s. 6, of the 1920 Act it is provided that the wholly different orders contemplated by it may be varied or rescinded in like manner as if they had originally been made by the confirming Court, it follows that the maximum of 2*l*. applies, notwithstanding that the sum contained in the order is a sum exceeding 2*l*., that is to say, as in this case, a sum of 5*l*. 10*s*.; or in other words that because under the Act of 1895 an order fixing a sum less than 2*l*. may not be varied so as to increase that sum to more than 2*l*., an order made under the Act of 1920, which fixes a sum exceeding 2*l*., must be reduced to that figure. It is an interesting and ingenious example of the perfect non sequitur. In my opinion the view which the justices were induced to take is quite contrary to the clear provisions of the statute, and involves, if I may say so, a serious misunderstanding of the purpose and scope of this legislation, the underlying purpose of which, as is obvious, is a reciprocal understanding between this country and the other parts of His Majesty's dominions, so as to make it not difficult but easy to enforce in this country orders made there and to enforce there orders made here. For that purpose in this country our existing machinery is employed, but there is nowhere to be found any indication that an

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order made by a Court in some other part of His Majesty's dominions for a sum exceeding 2*l.* must be reduced by virtue of s. 7 of the Act of 1895 to a sum not exceeding 2*l.* per week. In strictness perhaps the question does not really arise because, as I said, the whole argument started with a confusion between confirming an order and afterwards varying an order previously confirmed. Mr. Pratt suggested that it would have been nugatory to confirm an order for 5*l.* 10*s.* upon Monday if upon an application for a variation on Tuesday the justices were compelled to reduce the amount to 2*l.*, and he repeated the argument that there is a statutory maximum of 2*l.* in the case of such an order as this pursuant to the words referring to a totally different matter in s. 7 of the Act of 1895. In my opinion the justices misdirected themselves in point of law. There is here no such stereotyped limit of 2*l.* When the justices are asked to confirm the order they have to confirm it, either without modification or with such modification as to them after hearing the evidence shall seem just, always provided that the defendant fails to satisfy the Court that the order ought not to be confirmed at all. When they ask themselves what are the modifications they may impose, the answer is, such as seem to them just after hearing the evidence. If and when the later task of varying the orders arises, it is to be observed that such variation can only be made upon cause being shown upon fresh evidence to the satisfaction of the Court that the variation ought to be made. Here no evidence at all was adduced for the husband. That which was really the stage of confirmation was confounded with the later stage of variation, and the principle to be applied if and when variation should arise was based upon a misunderstanding of the maximum prescribed by s. 7 of the Act of 1895. In my opinion therefore the justices were wrong. The appeal must, I think, be allowed and the case remitted to the justices with our direction as to the meaning of these statutory provisions.

AVORY J. I am of the same opinion, and have nothing to add.

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SHEARMAN J. I am of the same opinion. A maintenance order for 5*l.* 10*s.* a week was made in favour of the appellant by a magistrate in Adelaide, South Australia, who apparently in such a matter has unlimited jurisdiction. In this country justices acting under the Summary Jurisdiction (Married Women) Act, 1895, can make such orders to an amount of 2*l.* only, although on some grounds our matrimonial Court has an unlimited jurisdiction. It is argued that under the Maintenance Orders (Facilities for Enforcement) Act, 1920, no order made in the dominions can be enforced here to a greater amount than 2*l.* per week, because the original jurisdiction of justices in this country is limited to that amount. I can see no warrant for such an argument either in the purpose and scope of the Act, or in the sections which carry out that purpose. The Act is to afford facilities for enforcing in this country by different tribunals orders properly made in the Dominions, and as long as the orders are properly made there they can be enforced in this country up to the amount stated therein, if the means of the defendant and the other circumstances justify this being done.

Appeal allowed.

Solicitors for appellant: *Freshfields, Leese & Munns.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for S. E. Crosse, Exeter.*

J. S. H.

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Feb. 19.

ATTORNEY-GENERAL *v.* DUKE OF BEDFORD.

Revenue—Succession Duty—Temporary Estate Duty—Full Enjoyment of Succession postponed by Reason of prior Interest—Property subject to Leases—Duty paid on Ground Rents—Subsequent Expiration of Leases—Duty in Respect of increased Value accruing upon the Determination of such Leases—Computation—Succession Duty Act, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 2, 10, 20, 21, 45.

In 1893 B. became entitled under a will to an equitable life interest in a residuary real estate, which included certain properties subject to leases at ground rents, and succession duty was then paid in respect of the succession to the extent of the ground rents. The leases having expired in 1922 and 1923, a question arose as to the increased value of the successions of B. to the properties then accruing:—

Held, that upon the true construction of ss. 20 and 21 of the Succession Duty Act, 1853, the increased values of the said successions of B. ought to be ascertained by reference to the increased annual values of the properties existing at the expiration of the leases, less the ground rents, and to the age of B. as at the expiration of the leases.

INFORMATION on behalf of the Crown.

Under and by virtue of the limitations contained in the will dated May 7, 1861, of the seventh Duke of Bedford (hereinafter called "the testator"), who died on May 14, 1861, the defendant, the eleventh Duke of Bedford, became beneficially entitled on the death of the tenth Duke, who died on March 23, 1893, to an equitable life interest in the residuary real estate of the testator. The defendant, who was born on February 19, 1858, was a descendant of a brother of the testator, the predecessor from whom the said succession of the defendant in the said residuary real estate was derived.

The residuary real estate included certain properties in London which at the death of the tenth Duke of Bedford were subject to leases at ground rents, and at such death succession duty and temporary estate duty were duly paid by the defendant in respect of his succession to the extent of the ground rents. The leases expired in Michaelmas, 1922, Lady Day, and Midsummer, 1923.

In May, 1924, the defendant delivered accounts as to the increased values of his successions to the said properties accruing on the expiration of the said leases. In such accounts

the defendant claimed to calculate such increased values by taking the gross assessments for property tax current at the death of the tenth Duke of Bedford less a deduction of 10 per cent., and also a deduction of the ground rents reserved by the said leases, and further claimed to have the increased values of his said successions ascertained on the tables by reference to his age at the expiration of the said leases.

The Attorney-General claimed that upon the true construction of the Succession Duty Act, 1853 (1), and in particular ss. 20, 21, and 45 of that Act, the increased values of the said successions ought to be ascertained by reference to the increased annual values of the said properties existing as at the expiration of the said leases, less the ground rents, and to the age of the defendant as at the expiration of the said leases, or alternatively that if the calculation ought to be based on the gross assessments as at the death of the tenth Duke of Bedford the age of the defendant ought to be taken as at that date.

The defendant admitted that he was accountable for succession duty at $4\frac{1}{2}$ per cent. and for temporary estate duty at 1 per cent. on the increased values of the said successions accruing on the expiration of the said leases, and the only

(1) Succession Duty Act, 1853, s. 20: "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there shall be any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination. . . . ."

Sect. 21: "The interest of every successor . . . . in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act. . . . ."

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question was as to the proper method of calculating such increased values.

The Attorney-General prayed a declaration that for the purposes of succession duty and temporary estate duty the increased values of the said successions of the defendant to the said properties accruing upon the expiration of the said leases ought to be ascertained by reference to the full annual values of the said properties as at the expiration of the said leases, less the ground rents thereby reserved, and to the age of the defendant as at such expiration, or alternatively that if such increased values ought to be ascertained, as the defendant contended by reference to the gross assessments for property tax as at the death of the tenth Duke of Bedford, the age of the defendant ought to be taken as at such death. (2.) That the defendant might be ordered to render proper accounts of the increased values of the said successions in accordance with the foregoing declaration and to pay succession duty and temporary estate duty accordingly at the proper rates.

Sir Douglas Hogg A.-G. and *J. E. Harman* for the Crown. Under s. 2 of the Succession Duty Act, 1853, every disposition of property by reason whereof any person shall become entitled to any property or the income thereof on the death of any person shall be deemed to have conferred upon the person entitled by reason of such disposition a succession, and under s. 20 succession duty is payable on the successor becoming entitled in possession to his succession. Where, however, there is a prior charge, estate, or interest which prevents the successor being entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such interest is payable at the time of such determination. The eleventh Duke of Bedford paid succession duty in 1893 upon the capitalized value of the ground rents, and when the leases fell in he became liable to pay succession duty upon the capitalized value of the rack rents at the time of the determination of the leases less the value of the ground rents upon which he

had already paid duty. That is the practice which has always been followed, and the practice was so stated in argument in *Attorney-General* v. *Mander* (1), where it was assumed that that was the proper practice. Kekewich J. also in *In re Kidd & Gibbon's Contract* (2) referred to the fact that "the payment of succession duty in respect of the reversionary value [of an estate] was postponed until by the determination of the leases the vendors should become entitled to the enjoyment in possession," and later he referred to the difficulty of compounding the duty in order to discharge the burden, "as no one knows what will be the value of the property upon the determination of the leases." The practice is stated in Hanson's Death Duties, 7th ed., p. 484, note 4, as follows: "In the case of property subject to a lease at a ground rent passing to a tenant for life, the income actually received by way of ground rent is taken as the basis for the valuation of the life interest. Should the lease fall in during the lifetime of the tenant for life, the increased benefit accruing is assessed on the basis of the rack rent less the former ground rent, and is valued according to the tables of the Succession Duty Act, taking the age of the tenant for life as it is at the date when the lease falls in." The successor has to pay succession duty on the increased benefit accruing to him at the date when the prior charge, estate, or interest is determined and not at the date when he became entitled to the succession.

Wilfrid Greene K.C. and *Dighton Pollock* for the defendant. Sect. 20 of the Succession Duty Act, 1853, does not create two successions in a case where the successor is not entitled to immediate possession to his succession by reason of the existence of prior estates or interests, but merely one succession. Lord Cave said in *Lord Advocate* v. *Macalister* (3): "By s. 20 of the Act the duty so imposed is made payable at the time when the successor becomes entitled in possession to his succession; but this section only defers the time for payment, in cases where the successor is not entitled to

(1) (1896) 65 L. J. (Q. B.) 246. (2) [1893] 1 Ch. 695, 699.
(3) [1924] A. C. 586, 591.

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immediate possession, until the right to possession matures, and the duty is none the less imposed and charged at the moment when the succession is conferred—namely, at the date of entitlement." Applying that principle to the present case the whole of the succession duty and not merely a part of it was imposed in 1893, when the Duke became entitled to the succession on the death of his predecessor. Sect. 20 only deferred the time for payment, but it did not alter the amount, or the incidence, of the charge. That view is borne out when one looks at the language of the section, because in spite of the postponement of payment of the duty till the determination of the lease, there is a provision that the duty may be previously paid, compounded for, or commuted, which implies that the amount of the duty is ascertainable before the leases fall in, and therefore the amount of the duty must necessarily be ascertainable at the date when the succession took place. If this construction of the section is adopted there is no element of uncertainty, as all the materials which are necessary for the purpose of computing the duty are present. The whole of the duty becomes chargeable at the date of the succession and is then ascertained, but the payment of duty upon the portion of the succession which has not fallen into possession is postponed until the successor is entitled to immediate possession. The note 4 in Hanson's Death Duties, 7th ed., p. 484, supports this view of the section. It is there stated that "The increased value which is taxed by this section is not a new succession, but a portion of the original succession, which escapes payment of duty in the first instance by reason of the prior charge; and it is evident from the context that it must be measured by reference to the amount of the charge itself and to the consequent diminution of the successor's enjoyment at the time of his first becoming entitled in possession, to which time alone can the word 'presently' apply. In other words, the diminution of benefit which the charge occasions to the successor in the first instance, and which is allowed as a deduction in his account as a decrease of the annual value according to which he is chargeable with duty, is the sole

measure of the increased value which he obtains when the charge determines, and any increase or decrease of annual value which may have arisen with regard to the property itself is not to be taken into consideration." The dictum of Kekewich J. in *In re Kidd & Gibbon's Contract* (1) was upon a point which was not before him, and was therefore obiter. The point in *Attorney-General* v. *Mander* (2) was whether the age of the vendor or of the purchaser should be taken in computing the value of the annuity. Neither of those cases is of any assistance in the present case.

Sir Douglas Hogg A.-G. in reply. The decision of the House of Lords in *Lord Advocate* v. *Macalister* (3) does not deal with the date when succession duty is to be assessed, but merely with the date when the succession arose. If the contention of the defendant as to what that case decided were correct the succession of the present Duke of Bedford arose on May 4, 1861, when the seventh Duke died, and the succession duty would have to be calculated on that date and not in 1893. The succession duty became a charge at the time when the succession was conferred in 1861, but it became payable at various times as the different parts of the property fell into possession.

ROWLATT J. I do not think this is a point of very great obscurity, and I am not influenced by the course of practice which is evidenced not only by text-books but, indeed, by at least one judgment. The very clear and ingenious argument advanced by Mr. Greene starts from the observations of Lord Cave L.C. in *Macalister's* case (4), where the House of Lords, construing a section of the Finance (1909–10) Act, 1910, which turned upon the date when the succession arose, held that the succession arose once for all. But even if one treats the succession as arising once for all and the duty as becoming chargeable once for all, I do not myself see why it should not be divided as regards payment and divided also as regards computation. Now clearly it is divided as

(1) [1893] 1 Ch. 695, 699.
(2) 65 L. J. (Q. B.) 246.
(3) [1924] A. C. 586.
(4) [1924] A. C. 586, 591.

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regards payment, because s. 20 of the Succession Duty Act, 1853, says in terms that when part of the property forming the estate is subject to a prior charge, estate, or interest, not created by the successor himself, which will fall in in the future, payment of the duty in respect of the increased value accruing upon the determination of such charge, estate or interest is to be deferred until it does fall in. That being so, why should not the one duty be also divided for the purpose of computation? According to the argument of counsel for the defendant it is divided for the purpose of calculating the annuity under s. 21 of the Act of 1853, because they start from the position that the annuity must be calculated as payable from the time when the leases fall in. In other words the contention is that for the purposes of s. 21 the time when the Duke became entitled in possession to his succession as regards these leaseholds was the time when the leaseholds fell in, because it is from that date that they say the annuity is to be treated as payable. But it is said that for the purpose of calculating the value of the annuity one must take the value of the annuity at the date when the Duke came into possession of the property which is subject to the lease, less a deduction of 10 per cent. Now I cannot conceive why that should be done. I do not say it is postponing the operation of calculating the annuity, but it is taking, for the purpose of calculating the annuity, the figures of the expectation of life at one date, and it is taking not the actual value of the property when the Duke enjoys it, but the value subject to a deduction at a long previous period. Why one should combine like with unlike for the purpose of arriving at the value of the annuity I cannot conceive, when it is perfectly simple to combine like with like. It seems to me that the plain general effect and intention of the statute is that a man has to pay succession duty on the value of an annuity representing what he receives and for the time he receives it. Every one agrees that the time for which the Duke receives this increased value is from the date when the leases fall in, for the rest of his life. I cannot conceive why the rack rents, which are what he receives, should not be

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taken as the basis of the calculation instead of the anticipation of the rack rents, valued at the time when he first came into possession of the ground rents. That is how I look at the matter prima facie. I think the words of s. 20 are much more consistent with that view because that section provides that "the duty in respect of the increased value accruing upon the determination of such charge, estate or interest shall . . . . be paid at the time of such determination." That is the duty in respect of the increased value then accruing, as the Attorney-General pointed out. That surely means the duty accruing in respect of the rack rents that fell in. I do not think those words are apt to describe the duty in respect of the anticipated falling in of leases many years afterwards, at the time when he came into possession of the ground rents. I think that s. 45 also supports that view, but I will not go into it at length.

I need not go in detail into the question as to the difficulties that it is suggested are made by the reference in s. 20 to the previous payment, composition, or commutation of the duty. I think however that those difficulties can be satisfied perfectly well without attributing to the section a meaning which would not in my opinion carry out the general purpose of the Act.

I think therefore that the Crown are right in this case, and that they must have judgment on the information.

Judgment for Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Taylor & Humbert.*

R. F. S.

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Feb. 25.

[IN THE COURT OF APPEAL.]

THE KING *v.* JUSTICES OF LINCOLNSHIRE.

Ex parte BRETT.

Bastardy—Evidence—Corroboration—Satisfaction of Justices—Jurisdiction—Certiorari—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict.* c. 65), *s.* 4.

By s. 4 of the Bastardy Laws Amendment Act, 1872, justices adjudicating upon a bastardy summons are to hear the evidence of the mother and such other evidence as she may produce and also hear any evidence tendered by or on behalf of the person alleged to be the father, "and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices," they may adjudge the man to be the putative father of the bastard child.

On a bastardy summons justices, having heard the evidence of the mother and such other evidence as was produced by her and other evidence tendered by the person alleged to be the father, made an order in these terms: "On hearing the said complaint and the evidence of the complainant and other evidence satisfactorily corroborating in a material particular her evidence and also the evidence tendered by the defendant, and being satisfied of the truth of the said complaint, it is adjudged that the defendant is the putative father of the said child" . . . . :—

Held, that the question whether the evidence of the mother was corroborated in some material particular by other evidence to the satisfaction of the justices, was a matter to be decided by the justices and therefore that, even if the other evidence did not corroborate the evidence of the mother, the justices had acted within their jurisdiction, and a writ of certiorari should not issue to quash their order.

Rule Nisi for a writ of certiorari to remove into the King's Bench Division a certain order dated November 13, 1925, made by a Court of summary jurisdiction at Long Sutton, in the county of Lincoln, whereby one Charles Brett, the applicant for the writ, was adjudged to be the putative father of the bastard child of one Ethel May Franks, the complainant. The ground for the rule nisi was stated to be that the order of the justices was made without, and in excess of, jurisdiction. The contention was that there was no other evidence corroborating the evidence of the mother in any material particular to the satisfaction of the justices, such as is required by s. 4 of the Bastardy Laws Amendment Act, 1872. (1)

(1) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4:

Complaint having been made by Ethel May Franks, a single woman living at Holbeach in the said county, that she was delivered of a bastard child at Holbeach on June 23, 1925, of which child she alleged that Charles Brett of Sutton St. Edmunds in the said county was the father, Charles Brett was summoned to appear to answer the complaint.

The complaint was heard on November 13, 1925. The following is the justices' note of the evidence given at the hearing, verified by the affidavit of the applicant :—

Ethel May Franks, the complainant. Fifteen years of age. Single. Boarded out with Mr. and Mrs. Hawkins, South Eau Bank, since four years of age until October. Child at workhouse, June 23. Boy. Mr. Hawkins died January 21, 1923. Since then I have slept same bed as Mrs. Hawkins. Son living at home, George, aged about forty. Mr. [?Mrs.] Hawkins not been away since Easter, 1924. Then alone with George Hawkins who never interfered with me. I know Charles Brett aged nineteen years. Both went to school together at South Eau Bank. To get to Bretts half a mile. One of my jobs was to fetch milk. I went about 6.45. Waited for milk. Saw Charlie Brett who talked to me sometimes. I remember September or October one evening, Wednesday night, went about usual time, passed over bridge, saw Brett, got milk, saw Brett on bridge again. He said nothing. Followed me. I walked towards home. He would persist in following me. As I got along road he would drag me home. On that night this happened. I was carrying milk. He took milk from me. Incident happened at Littleworth end of Greendrove, not far from South Eau Bank. I heard no one pass. Got home about eight o'clock. Defendant on following Saturday night when I went to Mrs. Flowers to fetch a paper gave me a packet of sweets and told me to say nothing about what he had done. I have had connection with no one else.

Cross-examined. I know Brett. He had never previously been out

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"After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child . . . . of a sum of money weekly, not exceeding five shillings a week, for the maintenance and education of the child, and of the expenses incidental to the birth of such child . . . . and of such costs as may have been incurred in the obtaining of such order" . . . .

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for walks nor spoken to me, no love making. Just same as other boys in village. Mrs. Hawkins did not go with me. Once Mrs. Brett's daughters went with me. On another occasion one daughter with me and on no other occasion have I been for milk when it was dark. On this night it was dark. Previously he had never made any suggestion. It was Wednesday in October. I was with Mrs. Hawkins all October. When I got to bridge he asked me if he could come with me. I said No. He walked with me. He first took milk away from me. He put milk down at Greendrove End, then had hold of my waist. Shouted. He told me to hold my noise. I struggled. He lifted up my clothes. He held both my hands in one, and lifted up my clothes, pulled down my knickers and had connection with me. My clothing was stained. Mrs. Hawkins did not see my clothes. I washed them myself. (This just happened.) No one saw anything of this. Afterwards I walked home. Mrs. Hawkins was in; also Mr. George. They did not notice I was excited. I was a bit upset, but I did not like to say anything about it as he asked me not to. On following Saturday he gave me a bag of sweets. Dolly Peat was there and Laura Ward also. He did not give them sweets. I have never mentioned this subject to him. George William Hawkins lived in same house as I did. Mrs. Hawkins was not away in September or October of last year. I was not at Mrs. Hawkins' in February of this year. George has never been familiar with me. I have never complained to Miss Peat that G. W. was continually messing me about. He has never come into my room. I never complained to defendant or anyone else of this. I have never had connection with Mr. George William Hawkins.

Re-examined. I had sometimes to wait for milk. I do not remember how dark it was. He would be a couple of yards away when I went over the bridge. Regarding the sweets, I took them home, and handed them round to my mother and uncle.

Mary Jane Hawkins. Widow. Complainant has been with me a long time. I have never had to complain of her conduct with boys. Son George William lives with me. Three bedrooms. George occupies one. I was away from home for a fortnight at Easter, 1924. In February of this year she was with me on holiday. I went out for two nights in August 1924. I have never had any suspicion between my son and complainant. I know defendant who is about four years older. The Bretts live half a mile away. I felt safe in sending Ethel for milk, about 7 P.M. Sometimes milk not ready. Never had anyone to see her home. Once a week she went out at night, (Saturdays), to fetch the paper. One Saturday night she came home with some sweets and I asked her where she got them. She was home on my birthday. Charles Brett's mother came to see me and then Charlie Brett came to see if he could clear it up.

Cross-examined. I asked him if he was father and told him Ethel said so. He said "It's a devil." I said "The girl says you are responsible." He did not say I was a liar. He said that the girl next door told him it was my son. I did not make anything of him.

George William Hawkins. Single man. I was practically guardian of this girl. There is no truth in the rumours. I remember Charlie Brett coming to the house one night last May. He came to see Ethel about her condition.

Cross-examined. His mother came first. He said he had come to see Ethel about the job. He said "I know nothing about it, it's a devil." I

never heard him say she's a liar. I know reports have gone about concerning me. Mother away for two nights in August. I have never made improper suggestions to her or to Miss Peat.

Mr. Williams for the defendant submitted that there was no case to answer. The Bench declined to say at this stage whether they considered there had been corroboration or not.

Charles Richard Brett. Twenty years of age. Never had connection with complainant. Recollect once seeing her go over the bridge; my sisters were with her. Episode of sweets. I gave her some sweets, end of packet. Episode at Hawkins's house. G. W. said "I know they'll blame me," and Mrs. Hawkins burst out crying. Police came later and I signed a statement.

Cross-examined. Girl came to our house for milk. I have seen her on very few occasions. My father milked. It is true milking finished about 7. She fetched milk continuously. She had often fetched milk in afternoon.

Ethel M. Franks, recalled. I had been in the habit of fetching milk for several months. I never fetched milk in afternoon.

Cross-examined. I have on odd occasions.

Re-examined. My usual habit was evenings.

Charles Richard Brett. I only saw her once in the evening; I must have been out with other boys card playing, &c. I am free about 5 P.M. With regard to the sweets, I was then helping to decorate the chapel. Had no conversation with her. I gave Ethel the packet because I did not like them. My mother went to see Mrs. Hawkins before I went.

Anna Brett. Mother of defendant. Mrs. Hawkins had a cow but sold it. She had milk from me. They had the morning's milk. We milked between 6 and 7. Complainant twice came after dark. I had some one sent home with her. In May I was sent for to go to Mrs. Hawkins. I went. Mrs. Hawkins said Ethel had branded my son with being the father. I told my son and he went up to see them. As he was long I went again.

Cross-examined. I say this girl has only been down twice in the evenings. I have done it in the case of other girls. My son is generally at home at night. Does not go out at night. Is not out half his time. Up to time of interview we had been friendly. I had conversation with my son who told me he had never had anything to do with Ethel. Son said he would go later.

Dorothy Annie Peat. South Eau Bank. Spinster. Live next door to Mrs. Hawkins. I was at chapel decorating last year. The complainant said in October last year that she did not like staying with Mr. Hawkins. This year said same thing adding he was always messing her about. Hawkins has made improper suggestions to me. In October Mrs. Hawkins was away four days and it was at that time Ethel made complaint. It was while Mrs. Hawkins was away in February that she made the next complaint. When I took paper in in October George got hold of my dress. I got away. I did not know Mrs. Hawkins was out. The incident in the strawberry field was about same time. He then showed his person to me, and asked me to come into the shed.

Cross-examined. Open country. Field away from habitation. I am twenty-seven years of age. I made no complaint. I did not think of it as a criminal offence. I did not think it was my business to speak to anybody about Hawkins's conduct. Mrs. Hawkins was away in October. Could give no reason for saying October. No other girls in St. Edmunds have confided in me.

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This completed the evidence.

The note continued: Order made for 7*s.* 6*d.* a week until child fourteen. The Chairman stated that he and the Rev. Herbert Conway Holland (one of the justices) did not vote, and that the other members of the Bench were unanimous. The Bench declined the request of Mr. Williams to know what corroboration they relied on. Mr. Williams objected. Recognizances son and father 10*l.* each.

The order of the justices, dated November 13, 1925, after reciting the complaint, continued in these words: "On the appearance of the defendant and on hearing the said complaint and the evidence of the complainant and other evidence satisfactorily corroborating in a material particular her evidence and also the evidence tendered by the defendant and being satisfied of the truth of the said complaint it is adjudged that the defendant is the putative father of the said child. And it is ordered that the defendant do pay the sum of 7*s.* 6*d.* per week for the maintenance and education of the said child from henceforth until the said child shall attain the age of fourteen years or if it shall die under that age until the date of its death." . . . .

On November 19 the defendant gave notice of appeal to the next practicable general Quarter Sessions of the Peace to be holden at Boston in and for the Parts of Holland in the county of Lincoln against the said order on the grounds, among others:—

(1.) that he was not the father of the said child;

(2.) that there was no legal evidence before the justices sufficient to enable them to adjudge him to be the father of the said child;

(3.) that the evidence of the mother of the said child was not corroborated in any material particular implicating him or at all by any legal evidence; and

(4.) that the said order was made without jurisdiction.

The appeal came on for hearing on January 4, 1925, before the quarter sessions. The advocate for the respondents took the objection that the recognizance had been entered before the notice of appeal had been given. The Court upheld the objection and dismissed the appeal.

The defendant then applied for and obtained a rule nisi

for a certiorari to remove into the King's Bench Division the order of November 13 with a view to having it quashed.

Sir Albion Richardson showed cause. There was enough in the evidence of the applicant himself to warrant the justices' decision that the mother's evidence was corroborated in some material particular by other evidence to their satisfaction, as required by s. 4 of the Bastardy Laws Amendment Act, 1872. But even if there was not, this Court cannot interfere, because the question whether there was or was not corroborative evidence to their satisfaction is one of the questions the solution of which is entrusted to the justices themselves by s. 4 of the Act; and therefore they have jurisdiction to decide it, and an erroneous decision does not deprive them of jurisdiction: *Reg.* v. *Bolton.* (1) The jurisdiction of an inferior Court may depend upon the answer to some question the solution of which is not entrusted to that Court; there an erroneous determination upon the question will not give the inferior Court jurisdiction, and its decision may be questioned upon a certiorari. But where the jurisdiction depends upon the answer to a question which the inferior Court itself is empowered to decide, there its decision will not be questioned by a superior Court.

[BANKES L.J. referred to *Rex* v. *Nat Bell Liquors, Ld.* (2)]

A. M. Sullivan K.C. (*Maurice F. Healy* with him) in support of the rule. It is a condition precedent to the jurisdiction of the justices to adjudge a man to be the putative father of a bastard child, that the evidence of the mother should be corroborated in some material particular by other evidence to their satisfaction. That is the plain meaning of the words "if the evidence of the mother," etc., in s. 4. The order of the justices must state not only that the mother's evidence was corroborated, but that it was corroborated in some material particular; otherwise the order is bad and may be quashed: *Reg.* v. *Read.* (3) Of course the order must state this truly. The evidence here shows that there

(1) (1841) 1 Q. B. 66. (2) [1922] 2 A. C. 128.
(3) (1839) 9 Ad. & E. 619.

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was in truth no corroboration of the mother's evidence, either in a material particular or at all. Then what was the duty of the justices? The case falls within the third class mentioned by Sir James Colvile pronouncing the judgment of the Judicial Committee of the Privy Council in *Colonial Bank of Australasia* v. *Willan* (1): "There is a third class of cases, in which the judge of the inferior Court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject matter of the inquiry beyond it. . . . . In all these cases the inferior Court, being incompetent to try a question of title, was bound to hold its hand when a bona fide dispute as to title arose before it." Then the learned judge cites a passage from the judgment of the Exchequer Chamber in *Bunbury* v. *Fuller* (2), cited by Blackburn J. in *Pease* v. *Chaytor*. (3) The passage from *Colonial Bank of Australasia* v. *Willan* (4) is cited with approval by Fletcher Moulton L.J. in *Rex* v. *Woodhouse*. (5) It is idle to say that there was corroboration to the satisfaction of the justices if there was no corroboration whatever; and there can be no difference between tendering as corroboration evidence which is not corroborative and tendering no corroborative evidence at all. So this case must be considered as one in which no evidence was tendered in corroboration of the mother's story; and then it was the duty of the justices to dismiss the complaint when they found there was no corroboration forthcoming. And clearly if the want of corroboration appeared in their order, the order would be bad on the face of it, and if the defect did not appear in the order, it could be shown by affidavit; and in either case the order could be quashed on a certiorari. The Legislature could not have intended either that a man should be found to be the father of a bastard on the uncorroborated evidence of the mother, or that the question, often a delicate one, whether there is corroboration of her evidence, should be

(1) (1874) L. R. 5 P. C. 417, 444.
(2) (1853) 9 Ex. 111, 140.
(3) (1863) 3 B. & S. 620, 640.
(4) L. R. 5 P. C. 444.
(5) [1906] 2 K. B. 501, 537.

left to the sympathy or caprice of the justices. The question must be tested by some more objective standard. The statute means that there must be some corroborative evidence, and that it must satisfy the justices; not that there need be no corroboration, and that nothing more is required than evidence which the justices may be induced to consider corroborative.

[*Rex* v. *Mahony* (1) was also cited.]

BANKES L.J. We granted the rule in this case because it raises a question requiring careful consideration. The point taken was that in the circumstances the justices had no jurisdiction to make the order which was made. An application had been made under s. 4 of the Bastardy Act, 1872, for an order declaring that the defendant to the application, one Charles Brett, was the father of the complainant's child. The complainant was called before the justices and told her story, and other evidence was called which was relied on by the complainant's advocate as corroborating that story in a material particular. Objection was taken at the end of the complainant's case that there was no corroborative evidence of her story, but the justices directed that the case should proceed. Thereupon the defendant was called and gave his evidence. At the end of the hearing the justices made an order which recites on the face of it that they had heard the evidence of the complainant "and other evidence satisfactorily corroborating in a material particular her evidence."

The question here is not whether the justices were right or wrong in their conclusion, or whether the other evidence amounted to corroboration in a material particular of the complainant's evidence. That question can generally be tested by an appeal to quarter sessions. It is greatly to be regretted that owing to some informality in entering into the necessary recognizance the defendant was precluded from having his appeal heard. The point taken here is that the justices had no jurisdiction to make the order. Now I desire

(1) [1910] 2 I. R. 695.

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to reserve the point which would arise if no evidence was even tendered in corroboration of a complainant's story. That is not this case. Here evidence was tendered. Objection was taken that it was not sufficient. The justices decided that it was sufficient. In these circumstances it is contended that a writ of certiorari will lie because the justices had no jurisdiction to make the order. In my opinion the answer to that contention is plain. The justices had jurisdiction by statute to inquire into the case made by the complainant, and particularly into the question whether the evidence of the mother was corroborated in some material particular by other evidence to their satisfaction. That matter was properly before them. They were bound to inquire and did inquire into it. May be they came to an erroneous conclusion upon it; but the fact that they were bound to come to some conclusion, right or wrong, shows that they had jurisdiction. And this matter was not collateral in the sense in which that word is used in the cases which have decided that justices cannot give themselves jurisdiction by an erroneous decision on some collateral matter upon which their jurisdiction depends. No doubt there are cases where the jurisdiction of justices is conditional upon the existence of some collateral matter, and then this Court has power to consider the question whether the conditions exist under which jurisdiction has been conferred on the justices; but the question raised here is whether the justices came to a correct conclusion upon a matter which it was for them to consider, and such a matter is not collateral, and those cases do not apply. The Divisional Court came to the right conclusion, and the rule must be discharged.

WARRINGTON L.J. I am of the same opinion. The justices clearly had jurisdiction to do that which the Act enjoins—namely, to hear the evidence of the woman and such other evidence as she may produce, and also hear any evidence tendered by or on behalf of the person alleged to be the father, "and," in the words of the section, "if the evidence of the mother be corroborated in some material particular

by other evidence to the satisfaction of the said justices they may adjudge the man to be the putative father of such bastard child." . . . . It seems to me plain that one of the things they had to decide, and therefore had jurisdiction to decide, in hearing the complaint was whether the evidence of the mother was corroborated in some material particular by other evidence to their satisfaction. Therefore it cannot be said that the existence of corroborative evidence was a collateral matter on which their jurisdiction depended. It was one of the very things upon which the decision is entrusted to them. It follows that the application for a certiorari must fail.

ATKIN L.J. I agree. This case is to be decided on a consideration of the terms of s. 4 of the Bastardy Amendment Act, 1872. The order of the justices shows that the evidence of the mother was corroborated in some material particular by other evidence to their satisfaction. The writ of certiorari was applied for on the ground that the order was made without jurisdiction, because the evidence of the mother was not corroborated in any material particular by any legal evidence. The first question is whether there was corroborative evidence, and in my opinion there was no evidence which could be called corroborative, except that of the defendant. He repudiated the imputation; but it is said he had offered the complainant a bag of sweets. It is not necessary for this Court to decide whether that is corroborative evidence or not; for assuming there was no corroboration, was there therefore a lack of jurisdiction on the part of the justices? The principle is laid down by Coleridge J. delivering the judgment of the Exchequer Chamber in *Bunbury* v. *Fuller* (1) in these words: "Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject matter which, if true, is within its

(1) 9 Ex. 111, 140.

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jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court." Then the learned judge gives an instance of a Court having a limited territorial jurisdiction and a matter of complaint being brought before it which one party asserts and the other denies to have arisen within the territorial limits. Here is a collateral issue independent of the merits; no doubt the inferior Court must give a decision upon it, but this decision being upon a point collateral to the main matter of complaint is open to review by the superior Courts, and if a superior Court decides that the matter of complaint arose outside the territorial limits, the result is that the inferior Court had no jurisdiction. But where the inferior Court has given a decision upon one of the points involved in the actual matter committed to its decision, it cannot be said that its decision upon that point is without jurisdiction. I think the law is accurately stated in Halsbury's Laws of England, Tit. Crown Practice, vol. x., ss. 374, 375: "Under various statutes certain notices are requisite before the commencement of proceedings; and the omission to serve such notices deprives the inferior Court of jurisdiction and affords ground for certiorari. The case is more difficult where the jurisdiction of the Court below depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower Court has to try, that Court cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess. The lower Court must, indeed, decide as to the collateral fact, in the first instance; but the superior Court may upon certiorari inquire into the correctness of the decision, and may quash the proceedings in the lower Court if such decision is erroneous, or at any rate if there is no evidence to support it. On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower Court has to inquire into, certiorari will not be granted, although the lower Court may have

arrived at an erroneous conclusion with regard to it." By the very terms of s. 4 one of the questions the justices have to decide is whether the evidence of the mother has been "corroborated in some material particular by other evidence to the satisfaction of the said justices." The justices have found that there was "other evidence satisfactorily corroborating in a material particular her evidence"—that is the evidence of the mother. That may have been, and I think it was, a wrong conclusion, but it was a conclusion on one of the very matters which is entrusted to their decision. This is not the only branch of the law where corroboration of a witness is necessary in order to establish a charge. By s. 4 of the Criminal Law Amendment Act, 1885, the testimony admitted by the section must be corroborated by other material evidence in support thereof implicating the accused, otherwise he is not liable to be convicted of an offence under this section. It would be unfortunate if a conviction based on evidence, which was not as a matter of law corroborated, should be considered as the act of a Court having no jurisdiction in the matter before it. For these reasons, I think, the remedy by certiorari is not open to the applicant.

Rule discharged.

Solicitors for the justices: *Smiles & Co., for Mossop & Mossop, Long Sutton.*

Solicitors for the applicant: *Rawle, Johnstone & Co., for Hunt & Williams, Peterborough.*

W. H. G.

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[IN THE COURT OF APPEAL.]

SCOTT *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

Workmen's Compensation—Fatal Accident—Leaving "a widow and in addition one or more children so dependent"—Wife's ante-nuptial illegitimate Twins by another Man—"Dependants"—"Member of a family"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 2.

The employers of a deceased workman are not liable to pay compensation in respect of the accident which caused his death, to the illegitimate children of his widow by another man born before her marriage to the deceased.

Such children do not come within the definitions of "Dependants" or "Member of a family" in s. 13 of the Act of 1906, and s. 2 of the Act of 1923 does not extend the class of persons to whom benefit is payable, but only extends the amount of benefit paid to persons already entitled under the Act of 1906.

Pritchard v. *Bettisfield Colliery, Ld.* [1925] 2 K. B. 284 distinguished and explained.

APPEAL from a decision of the judge of the Spilsby County Court.

The applicant claimed compensation for herself and her two children by reason of the death of her husband, a platelayer in the employment of the respondents, who was killed on their line on June 4, 1925.

The children in question were the illegitimate twin daughters of the applicant by another man, and were born some years before her marriage, on July 3, 1923, to her deceased husband. In 1919 she had obtained a maintenance order of 4*s.* a week each against their putative father, who paid the same more or less regularly. The children lived with the applicant's sister, to whom the applicant paid the maintenance money, and when it was in arrear she paid the amount out of the weekly money paid to her out of his earnings by the deceased, reimbursing the amounts so paid when the arrears were received. The applicant also, out of the moneys given to her by the deceased, after providing for household necessaries for herself and him, paid for clothes and boots for the twins.

The respondents admitted the widow's own claim and paid the full compensation of 300*l.* into court, but they resisted her further claim on behalf of the twins, which she made under s. 2 of the Act of 1923. The county court judge decided against this latter claim, but found that the children were in fact partially dependent upon the earnings of the deceased, and made an estimate of the sum which ought to be paid into court if the children should be held, as a matter of law, to be entitled to receive compensation.

The applicant appealed.

The appeal was heard on February 5, 1926.

Shakespeare for the appellant. The application is made under s. 2 of the Act of 1923. This workman has left a widow wholly or partially dependent upon his earnings. That fulfils the first condition of the section and establishes liability under the Act of 1906. Then the next condition is that he leaves one or more children under the age of fifteen so dependent. That condition is also fulfilled in this case. The section does not specify whose children they must be; that question is immaterial, so long as there are some children dependent on his earnings. The section does not say "and leaves one or more dependants under the age of fifteen" so as to limit the meaning by the interpretation of "dependants" under s. 13 of the Act of 1906. It includes all children dependent on the workman's earnings. The word "child" has no reference to parental relationship, and would include an adopted child. This appears from some of the judgments in *Pritchard* v. *Bettisfield Colliery, Ld.* (1) The Legislature by putting s. 2 in the words used meant to make the section very wide and not confine its scope to "dependants" as defined by the earlier Act. "Child" for the purposes of s. 2 means "a young human person": per Warrington L.J. in *Pritchard* v. *Bettisfield Colliery, Ld.* (1) The Act of 1923 has altered and extended the law on this question.

I cannot argue that the deceased was stepfather to these children, as that contention is not open to me in this Court

(1) [1925] 2 K. B. 284.

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after *McLean* v. *Moss Bay Iron & Steel Co.* (1), but I reserve that argument.

Wingate-Saul K.C. and *Cope Morgan* for the respondents were not called upon.

LORD HANWORTH M.R. This appeal must be dismissed with costs. It has raised an interesting point, and we have had the advantage of Mr. Shakespeare's candid argument upon the case. The appeal is really based upon an interpretation which he asks us to put upon the judgment which was given by this Court in *Pritchard* v. *Bettisfield Colliery, Ld.* (2)

The facts are quite short. [His Lordship stated the facts and continued :] I agree with the decision of the learned county court judge. He has examined the two cases which were relied upon, *McLean* v. *Moss Bay Iron and Steel Co.* (1) and *Pritchard* v. *Bettisfield Colliery, Ld.* (2), and I think that he has come to a right conclusion in law. As a matter of fact, I was a member of the Court which decided *Pritchard* v. *Bettisfield Colliery, Ld.* (2), and I see no reason to take back any observations that I made in the course of that judgment. That was a simple case. The question that arose there was whether a grandchild, who was the illegitimate child of a child of the deceased, was entitled to compensation, but it was a child that was in the natural direct descent from the workman who had lost his life, and the Court came to the conclusion that the illegitimate grandchild was entitled to compensation. It is not impossible that in the course of the judgments in that decision observations may be found which, taken apart from their context—more particularly as they relate to family relationships which are not always easy to define—lend colour to an appeal in the present case, but, read as the decision in that case ought to be read, I think it affords no foundation for saying that in the present case a claim can be made on behalf of the illegitimate children, of which the deceased platelayer was not the parent.

The case is put in this way : it is said that s. 2 of the Act

(1) [1909] 2 K. B. 521. (2) [1925] 2 K. B. 284.

of 1923 is to be read widely, and that that was determined in *Pritchard* v. *Bettisfield Colliery, Ld.* (1); and that, inasmuch as in the present case there is a widow who was a dependant, the first words of the section are satisfied—namely, "where a workman leaves a widow wholly or partially dependent upon his earnings," and that then there is induced the responsibility which the later words of the section carry—namely, "and, in addition"—in addition to the widow—"leaves one or more children under the age of fifteen so dependent." It is said here that the workman did leave one or more children, because there were in fact these twins, who in some way did receive benefits from the earnings of the workman. In my judgment that is not a right or possible way of reading or giving effect to s. 2.

It must be remembered that by s. 31, sub-s. 2, of the Act of 1923, that Act is to be construed as one with the principal Act, and the interpretations and references in each Act have to be used so that the two Acts can be read together, the later Act being engrafted upon the Act of 1906, which is the principal Act. In the Act of 1906 we find that s. 13 gives the interpretation to a number of words. Under s. 13 the word "dependants" is to be read as meaning "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent." But there is also introduced into the meaning of the word "dependant" something more, that is to say, that you may have a dependant "where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings"; in other words, there are introduced and included in the word "dependants" those who are in the natural ascent or descent in blood, if not also by terms of matrimony, upwards or downwards from the person who was the workman injured. But it is plain that that addition to the word "dependants" is

(1) [1925] 2 K. B. 284.

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introduced for the purpose of bringing in particular cases where, without the marriage tie, there is a natural relation of the dependants to the person who had been injured. In the next definition, where " member of a family " is defined to include (inter alia) stepfather, stepson, and stepdaughter, illegitimacy is not introduced, but what may be called the ties which are usually respected are deemed to be the basis of membership of a family.

In the present case we are dealing with the death of a workman who had no blood relationship of any kind to the two suggested dependants. They were as much adopted children as anything else. They may have been children to whose support he contributed, but Mr. Shakespeare quite candidly says that he would not claim that they are within the meaning of the words " dependants " or " member of a family " as defined by the Act of 1906.

Then we come to s. 2 of the Act of 1923, and if that section is to be read with and engrafted upon the Act of 1906, and this claim were to be allowed, it would have enlarged the borders of the two Acts united together far beyond what was contemplated by the definition section of the earlier Act. It appears to me that s. 2 of the Act of 1923 intends to deal with a widow and member of a family as interpreted by s. 13 of the earlier Act, and that when it refers to " leaves one or more children " it means persons who could be claimed to be natural children of the deceased workman, and not what I may call putative children imposed upon the deceased workman. The other way of reading it is to assume that s. 2 has broken away from the Act of 1906, and intends, when it uses the words " one or more children," to refer to any young persons, whatever their relationship may be to the person who has been injured. I do not think that it is fair to read the observations which were made by Warrington L.J. in *Pritchard* v. *Bettisfield Colliery, Ld.* (1), in that sense. The decision we had to make in that case was, and must be considered, in relation to the fact that there was a direct natural relation between the person who was claimed to be a

(1) [1925] 2 K. B. 284.

dependant and the deceased. We were not thinking of a wholly different attachment—for I will not call it a relationship—which exists in the present case. It appears to me that reading the two statutes together as they are intended to be read, and giving as wide an interpretation as we intended to give in *Pritchard* v. *Bettisfield Colliery, Ld.* (1), to the word "children," it still does not go beyond what I may call the natural children of the parties concerned so as to introduce a different category—namely, those who have been adopted, and who are not in any true sense the children of the deceased person. Any other interpretation appears to me to be somewhat fanciful, as well as difficult; and it must not be forgotten that the provision which the law makes under a different statute, and which attached in this case, under which the children were obtaining their 8*s*. a week, is a clear indication that they were not children or to be imputed as children of the deceased workman. If, therefore, they are to be introduced as dependants, you must find that under the Act of 1906, as you do not, or it must be because s. 2 is so widely drawn as to break away from the definitions which are in the Act of 1906.

It appears to me that the learned judge came to a correct conclusion. I do not think the cases to which we have been referred intended to go the length to which it is suggested some portions of the judgments might lead, and for these reasons I think that the appeal must be dismissed with costs.

SCRUTTON L.J. I should content myself with agreeing with the judgment of the county court judge in this case but for the fact that we are told that this important subject is to be reviewed in a superior tribunal, and therefore I think it right to state the way in which I arrive at the result.

A workman has died. He was married, and his wife, his present widow, had, before marrying him, two illegitimate children by another man who is still living, and who is contributing with considerable, though not complete, regularity, 8*s*. a week to the support of his two illegitimate children

(1) [1925] 2 K. B. 284.

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under an affiliation order. The question is whether the employer of the dead man is liable to pay compensation for the dead man's death to the illegitimate children of his widow by another man.

I look, first, at the statute. The Act of 1906 requires the employer to pay compensation for the death of the workman, in this case, in accordance with the First Schedule to that Act. I turn to the First Schedule: "The amount of compensation under this Act shall be—(*a*) where death results from the injury—(i.) if the workman leaves any dependants wholly dependent upon his earnings," so much to be divided between them. I look next to see who are "dependants," and I turn to s. 13 of the Act: "'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death." Dependants, therefore, must be members of the workman's family prima facie. "Member of a family" is defined as including son, daughter, stepson, and stepdaughter, but something further is contained in the definition of "dependants." The ordinary policy of the English law is not to recognize relations created through illegitimacy. A bastard is a nullius filius, he is nobody's son, and it is one of the comments made, by foolish people who do not understand things, on the law that the fool of a law says that a mother is no relation to her illegitimate son. I do not discuss the policy of the matter, but that undoubtedly is the position, except that certain statutes have said that illegitimate children shall for certain purposes be recognized, but that does not prevent the policy of the law continuing and not recognizing relations created through illegitimacy except where statutes require it to do so. This statute says, in defining "dependants," "and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings" the word "dependants" shall include such an illegitimate child. Therefore the statute tells me that in the case of a death of a workman, if he is the parent or the grandparent of an illegitimate child, that illegitimate child shall be included in the dependants

who are to be compensated, and, I think, also in the members of the workman's family, but the statute stops there.

Now this man who died was not the parent of these children. It is impossible to say he was the parent of these children. He was not the grandparent of these children. Prima facie, therefore, these children are not within the definition of dependants or members of the family in the Act of 1906. Mr. Shakespeare hopes to address to another tribunal an argument that the man was their stepfather. He is precluded from addressing it to this Court by the fact that the late Master of the Rolls, Lord Cozens-Hardy, has described the suggestion as preposterous, but he hopes he will be able to induce the House of Lords to say that it is really good sense and not preposterous. We, however, are bound by the decision of this Court in *McLean* v. *Moss Bay Iron and Steel Co.* (1), where all the members of the Court agreed that a man was not a stepfather of his wife's illegitimate children by another man. That being the Act of 1906, while that Act alone continued in force, as far as I know, the case to which I have just referred was the only attempt to bring into "dependants" illegitimate children of whom the dead man was not the parent or grandparent, but, as I understand, Mr. Shakespeare argues to us that the Act of 1923 has altered that, and has brought in children who could not recover under the Act of 1906, and has also brought in adopted children who were no relation in any way to the dead man.

The Act of 1923 begins with a set of sections headed "Amendment of Benefits under Principal Act," and later goes on to extensions of the principal Act, where it brings in different persons to take the benefits; it does not merely extend the benefits to existing persons. I understand Mr. Shakespeare's argument to be that this particular s. 2 has got into the wrong part of the Act; it ought to have been in the extension of the Act to other people. It is, as a matter of fact, in the extension of benefits to people who are defined by the 1906 Act. It is this: "Where a workman leaves a

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widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent." I read that section as relating to the dependants under the Act of 1906, and saying that in certain cases those dependants shall receive an increased benefit other than they would receive under the Act of 1906. Mr. Shakespeare, as I understand, reads it as extending the people who are to be benefited on the death of the workman, and to say that children who are not dependants under the Act of 1906 are brought in to receive compensation under this section. He says, where a workman leaves a widow wholly or partially dependent upon his earnings—and this workman left a widow wholly or partially dependent upon his earnings—and, in addition, leaves one or more children—and this man when he left this world did leave one or more children, no relation to him it is quite true, but he left them and had been contributing to their benefit, then the children shall receive so and so. If it is not irreverent, I was reminded of "The Pirates of Penzance." Major-General Stanley said that he had come to humble himself before the graves of his ancestors. He was told they were not his ancestors. He said: "I do not know whose ancestors they were, but I know whose ancestors they are now." Mr. Shakespeare seems to say "'leaves children' means 'dies and there are children dependent on him'; I do not mind whether they are related to him; I do not mind whether they are adopted children; I do not mind whether they are children of another man and the woman who is now this widow; he left children, and he was contributing to their maintenance."

The way in which I should construe this s. 2 is that it is dealing with the existing dependants, the dependants under the Act of 1906, and it provides, inasmuch as the value of money has very much decreased, that more money shall be distributed among those dependants than would have been distributed under the Act of 1906. The words of the headings to the section are: "Increase of amount payable on death

of workman leaving children," and " Amendment of Benefits under Principal Act." To construe it, therefore, I should look to see who were the dependants who ought to benefit by the death of this workman, and I find it excludes illegitimate children of whom he is not the parent; it includes illegitimate children of whom he is the parent. I am afraid that I tested Mr. Shakespeare's patience by keeping on saying to him that the words of s. 13 of the Act of 1906 were, " and where the workman, being the parent of an illegitimate child," and I have been quite unable to understand what meaning Mr. Shakespeare has given to these words " being the parent of " when he asks for compensation for children of whom the deceased workman is not the parent or grandparent.

Then we were also referred to the recent decision of this Court in *Pritchard* v. *Bettisfield Colliery, Ld.* (1) The Master of the Rolls was a party to that case, and he has explained why in his view this Court is not bound by it. I also take the view that I entirely agree with the case, but that this Court is not bound by certain expressions in the judgments of some members of the Court which could be read as addressed to these particular facts, but if so, would be read as addressed to a state of facts which was never before the Court, and which was not argued before the Court. In *Pritchard* v. *Bettisfield Colliery, Ld.* (1), the appellants, the employers, were trying to use the Act of 1923 to cut down the Act of 1906. They were saying: " Under the Act of 1906 the illegitimate child of a dead man would receive compensation, or the illegitimate grandchild "—in that particular case the person who was wanting compensation was the illegitimate grandchild of the dead man—" but," said the argument in that case, " when you look at the section of the Act of 1923 it does not use the word 'grandchild,' it uses the word 'child,' " and it was argued rightly or wrongly that an illegitimate grandchild was not a member of the family within the Act of 1906, and that s. 2 of the Act of 1923 ought to be interpreted as limited to

(1) [1925] 2 K. B. 284, 291.

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members of the family. But this case is seeking, not to cut down the definition of 1906, but to use the Act of 1923 to extend the definition of 1906. I have given the reasons why I think that s. 2 of the Act of 1923 has to be construed as applying to the dependants mentioned in the Act of 1906. When Warrington L.J. says : " It is clear upon that definition that the word ' child,' as used here, has no reference to parental relationship," I think his language has been misunderstood. He is not referring to direct hereditary connection, because he goes on to say : " because the workman is described as being the grandparent of a child as well as the parent of a child." He is referring to the direct relation of father and son, or father and daughter, as distinguished from the relation of grandfather and grandchild, grandfather and granddaughter, and he winds up his judgment in exactly the way in which I should deal with the case. " You have to look back to the definition of ' dependants ' to see what that means, and you find that if a young person is an illegitimate grandchild, he or she is properly included amongst the persons who are ' so dependent.' It seems to me to be inevitable that for the purposes of this section . . . . the word ' children ' must mean dependent children, and when you look back to s. 13 of the Act of 1906 to see what dependent children there are, you find that illegitimate children and illegitimate grandchildren are included " ; that is to say, Warrington L.J. is using the definition of " dependants " in the Act of 1906, as I do, to interpret the use of the word " children " in the Act of 1923. I agree that Atkin L.J. takes a wider view. He apparently thinks that the section of the Act of 1923 was intended for the protection of child life, and apparently uses language which would cover an adopted child ; but all I can say is that that question was not before the Court at all, it was not argued. Atkin L.J. says : " It was an increase directed in the interests of child life, and not in the least directed to the maintenance of family ties or the provisions for the legitimate family only." It seems to me that it was directed to " dependants," as defined by the Act of 1906, and to increasing the benefits given to them because

of the decrease in value of money owing to the War. All I desire to say about that part of Atkin L.J.'s judgment is that the matter was not before the Court, it was not argued, and that I personally am not bound by an expression of opinion of that character in a matter not before the Court, and not argued, an expression of opinion with which I disagree. I entirely agree with the result of the decision, and there appears to me that there is nothing in the result of the decision, as I understand it, as explained by the Master of the Rolls, which prevents us in this case from saying that these children, not being children of whom the deceased workman is a parent, are not within the definition of "dependants" in the Act of 1906, and in my view, therefore, not within the definition of "member of a family" in the Act of 1906, and that the Act of 1923 is not intended to extend the class of persons to whom benefit is paid, but to extend the amount of benefit paid to the persons who are already entitled under the Act of 1906.

For these reasons I think that the county court judge came to a right conclusion, and that the appeal should be dismissed.

SARGANT L.J. I am of the same opinion. The question is whether s. 2 of the Workmen's Compensation Act, 1923, has any application. That section applies in this case: "Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent." The deceased workman did leave a widow, and the only question to be determined is whether he left, in addition, one or more children under the age of fifteen so dependent. The persons who are said to fulfil that qualification were twin daughters of the workman's wife, who had been born before the marriage, who were the children of another person, and who were at the date of the workman's death in fact not forming part of the workman's

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family in any ordinary sense, but living apart, and having only a portion of their maintenance provided in fact by the workman through the medium of their mother. In any ordinary meaning of legal language those two illegitimate children cannot possibly be looked on as children of the workman.

It is true that under the Workmen's Compensation Act, 1906, there is a definition of " dependants " which has the effect of curing illegitimacy in certain cases. But it does so in those cases only, and it is clear that this is not one of those cases, because the definition only applies to persons in direct descent or ascent from the workman who is killed. Here these children, of course, are in no relationship at all, by nature or otherwise, to the workman who is killed. But what is said is this, that when the workman has left a widow, you then, in considering whether he has fulfilled the second qualification of leaving one or more children under the age of fifteen so dependent, can leave out altogether the question whether they were his children in any sense at all; and if there was an adopted child, or any child to whose support he was contributing, so that that child sustains a detriment by the workman's death, that thereupon the second qualification of the section is fulfilled, and the additional benefit is claimable.

In my opinion that is to extend the words of the section to a quite illegitimate extent. I think that this case could hardly have been brought on appeal but for some wide language in the recent decision of this Court in *Pritchard* v. *Bettisfield Colliery, Ld.* (1) That case was very different from the present. It was an attempt to exclude from the additional benefit given by the statute of 1923, persons who were clearly entitled to original benefit under the statute of 1906. The present case is an attempt to extend the benefit of the Act of 1923 to persons who could not possibly have come within the original benefit under the Act of 1906, except, of course, for the second argument of Mr. Shakespeare

(1) [1925] 2 K. B. 284.

that the deceased workman was the stepfather of these two illegitimate children. I do not deal with that argument, because it is entirely precluded in this Court by the decision which has already been given in the case of *McLean* v. *Moss Bay Iron and Steel Co.* (1), and the argument was only mentioned to us because it was an argument which is technically available for the present appellants if they go to a higher tribunal. Apart from that argument it is clear here that the persons in respect of whom this additional benefit is claimed could not possibly have succeeded in obtaining any original benefit under the Act of 1906. That appears to me to be a very strong argument against them, and, further, as regards the actual decision in *Pritchard* v. *Bettisfield Colliery, Ld.* (2), that really turned, as Atkin L.J. said in his judgment, on this, that in reading s. 2: "Where a workman leaves a widow or other member of his family . . . . wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent," the argument against the children rested upon reading into those words "leaves one or more children" the additional words "being members of the family." The Court rejected that attempt to limit those words "one or more children," and gave to the words "one or more children" the wider effect which was expressly given by the Act of 1906 in the definition of "dependants" by excluding illegitimacy as a disqualification in the particular case of a direct descendant from the workman who was injured. I feel no doubt that the decision in that case was perfectly right in rejecting that attempt to limit the word "children" in s. 2 of the Act of 1923.

If the judgments in *Pritchard* v. *Bettisfield Colliery, Ld.* (2), are read with reference to the point which was actually decided there, I have no remark whatever to make upon those judgments, and I think they should be read in that light; but if they are read in the light in which Mr. Shakespeare asks us to read them, then it seems to me that the

(1) [1909] 2 K. B. 521. (2) [1925] 2 K. B. 284.

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observations go too far, and are not justified by the language of the Acts in question.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Pattinson & Brewer.*

Solicitor for the respondents: *Sir R. Francis Dunnell, Bt., K.C.B.*

R. M.

C. A. 1926 *Feb.* 3, 10.

[IN THE COURT OF APPEAL.]

FEENEY *v.* FIRBECK MAIN COLLIERIES, LIMITED.

Workmen's Compensation—Accident—Weekly Payments—Certificate of Workman's Doctor that he was fit for Work—Workman's Receipt for last weekly Payment as "final claim"—Subsequent Arbitration—Ending weekly Payments "in pursuance of an agreement"—Unrecorded Agreement—Consideration—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. II., cl.* 9—*Workmen's Compensation Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 14.

It is not necessary that an agreement within the opening words of s. 14 of the Workmen's Compensation Act, 1923, in pursuance of which an employer becomes entitled to end or diminish weekly payments irrespectively of the restrictions contained in that section, should be a recorded agreement complying with the terms of cl. 9 of Sch. II. to the Act of 1906. It may be an agreement, to be gathered from all the circumstances of the case, based on assent or acquiescence on the part of the workman.

The payment, without question or demur, by the employer of the final weekly payment to the workman after the latter has produced his own doctor's certificate that he was fit for work again, is sufficient consideration for such an agreement, if consideration be necessary.

APPEAL from a decision of the judge of the Worksop County Court.

The following statement of the facts is taken from the considered judgment of the Master of the Rolls:—

"On the 19th April, 1924, James Feeney, who was in the employ of the respondents, suffered an accident. He was lifting a somewhat heavy weight when something in his back gave way, with the result that he was incapacitated from continuing his work. The respondents paid him full

compensation from the date of the accident. He received treatment in hospital and afterwards at Buxton. On the 5th January, 1925, Feeney's own panel doctor gave him a certificate as follows: 'This is to certify that J. Feeney is now able to resume his employment.' He took this certificate to the colliery on the same day, which happened to be a Monday, the day on which compensation claims were usually paid. He was paid on that day the weekly payment of thirty shillings, and the cashier told him that in accordance with the certificate this would be the last weekly payment. Feeney, who cannot read, but, as the county court judge finds, is 'quite able to look after himself,' signed a receipt for this payment as follows: 'Received the sum of 1*l.* 10*s.* compensation calculated to the 3rd January, 1925, as agreed under the Workmen's Compensation Acts. Final claim.'

In his evidence, Feeney said that he wrote his signature to this receipt and that when the cashier said the compensation would be stopped, he said: 'All right.'

Thereafter Feeney accepted the position thus established. He never attempted to go back for his old work, and made no further claim until 7th August, 1925, when solicitors on his behalf made a claim against the colliery company, to which the solicitors for the latter replied: 'that the weekly payment, which had up to that time been paid to your client, was terminated by agreement with your client on 5th January last, your client quite understanding that the payment then made was in settlement of his final claim.'

Proceedings for an arbitration were commenced on 25th September, and the case was heard on 10th November, 1925, when the county court judge made an award dismissing the claim. He found as a fact, upon evidence which was abundant to entitle him so to do, that Feeney was fit for work on and after 5th January, 1925. He overruled the objection that weekly payment had not been determined in the manner provided by s. 14 of the Act of 1923, holding that the weekly payment had been ended by agreement, within the meaning of the section. Hence this appeal."

The appeal was heard on February 3, 1926.

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John Neal for the appellant. This is an appeal against the award, so far as it refused compensation, on the ground that s. 14 of the Act of 1923 has not been complied with and that the appellant is entitled to compensation between January 3 and the date of the award.

There was no agreement, and if there was, there was no final agreement and no agreement was recorded. Further, there was no consideration for any agreement.

There was no evidence of an agreement and no consideration, and the receipt given by the appellant is not an estoppel: *Hughes* v. *Vothey Quarry Co.* (1); *Hawkes* v. *Coles* (2); *Macandrew* v. *Gilhooley.* (3) A workman cannot enter into an agreement giving up his rights unless there is consideration.

Any such agreement as alleged comes within the words "weekly payment varied" and "any other matter decided under this Act" in cl. 9 of the Second Schedule to the Act of 1906, and must be recorded, and unless that is done there is not an agreement within the opening words of s. 14 of the Act of 1923. Sect. 3, sub-s. 1, of the Act of 1906 provides for contracting out, and an unregistered agreement is void for the purposes of the Act. An agreement for compromising liability under the Act is invalid unless recorded: *Russell* v. *Rudd.* (4) Where the employer redeems his liability for a lump sum, that agreement has under s. 12 of the Act of 1923 to go before the registrar or the county court judge, and if that is so it is difficult to see why the agreement in this case, when the liability was redeemed for nothing, should not have to be recorded. Similarly under s. 11 (*c*) of the National Insurance Act, 1911, an agreement for compensation less than 15*s.* a week has to be recorded.

It is not enough for the county court judge to find that the appellant assented to the position.

R. H. Norris for the respondents. The cases cited were cases of compounding future liability, and I do not dispute that agreements of that nature must be recorded. Here the

(1) (1908) 1 B. W. C. C. 416.
(2) (1910) 3 B. W. C. C. 163.
(3) (1911) 4 B. W. C. C. 370.
(4) [1923] A. C. 309.

liability had ceased. This agreement did not require registration: *Ryan* v. *Hartley*. (1) *Russell* v. *Rudd* (2) was a case of contracting out, and therefore distinguishable. The redemption of weekly payments and the settlement of disputed claims are the only instances of agreements which the Act makes void unless approved and recorded. Other claims are settled by consent and agreement in countless cases where the agreements are not recorded.

Acquiescence by the workman is sufficient. Under s. 14 of the Act of 1923 there must be acquiescence on his part in both cases (*a*) and (*b*), and in case (*c*) acquiescence may be inferred from a ten days' silence. The present is an a fortiori case, because the workman brought his own doctor's certificate saying that he was fit for work. In *Davies* v. *Glyncorrwg Colliery, Ld.* (3), the workman had never acquiesced in the stopping of the payments, but in this case the man had agreed to end his compensation, and the question of his incapacity was not in dispute: *Bent Colliery Co.* v. *O'Hare*. (4)

If consideration is necessary for the agreement, there was sufficient consideration, because on his doctor's certificate the appellant's disability and the respondents' liability had ceased, and the 30*s.* paid to him on January 5 was not a liability admitted by the respondents, and therefore was a sufficient consideration.

[He also called attention to the various references to "agreement" contained in the Act of 1906 and the Schedules thereto.]

Neal in reply.

Cur. adv. vult.

Feb. 10. LORD HANWORTH M.R. stated the facts as above set out and continued: Counsel for the appellant agrees that he cannot ask that the award be reversed; but he claims that the applicant is entitled to be paid the arrears of weekly payments which were being paid in January, 1925, and ought to continue to the date of the award, on the ground that they were not ended in accordance with s. 14 of the Act of 1923.

(1) [1912] 2 K. B. 150.
(2) [1923] A. C. 309.
(3) [1925] 2 K. B. 339.
(4) (1924) 17 B. W. C. C. 424.

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The short point that this Court has to determine is whether upon the facts found there was what in law amounts to an agreement within s. 14 of the Act of 1923, or whether the agreement therein referred to must comply with the terms of cl. 9 of the Second Schedule to the Act of 1906, if it is to be treated as valid and effective; for it is said, it related to a matter "decided under this Act by agreement" within the terms of that clause.

In my judgment the learned judge was right. True it is that an agreement for the redemption of a weekly payment by a lump sum, if not registered, is not effective to give exemption under it: see Sch. II., cl. 10. But no such penalty is enacted under cl. 9. If and when the memorandum is registered it becomes enforceable for all purposes as a county court judgment; it has certain powers attached to it; but there is no prohibition of an agreement unless and until it is embodied in a memorandum and registered.

It was decided in *Russell* v. *Rudd* (1) that an agreement whereby the workman gives up his right to a weekly payment under the Act is void by s. 3, sub-s. 1, and that the only way by which an employer—apart from a certified scheme—can avoid future liability under the Act is by recording the agreement. Effect was given to this decision in s. 21 of the Act of 1923, but in the proviso the question whether or not the liability to pay compensation is doubtful, is allowed to have play.

Our attention has been called to a number of places in the Act of 1906 and Sch. I., where the word "agreement" occurs. In many it is difficult to appreciate why a recorded agreement is to be required, and a recorded agreement only intended. In cl. 8 of Sch. I. the "question as to who is a dependant shall, in default of agreement, be settled by arbitration"; and in cl. 15, "in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment," the text seems to indicate that the meaning is—if there is a disagreement, a divergence of opinion.

(1) [1923] A. C. 309.

We have already decided in *Pudney* v. *William France, Fenwick & Co.* (1) that s. 14 provides an interim procedure, and does not finally determine the rights of the parties. It seems unnecessary, therefore, that an agreement come to within its meaning should be defined and recorded with the same precision that may well be required in the case of the final redemption of weekly payments: Sch. II., cl. 10.

In *Guest, Keen & Nettlefolds* v. *Williams* (2) we expressed the opinion that the agreement referred to in s. 14 was by acquiescence, rather than of a formal nature. In my judgment this view is correct. If the procedure provided under s. 14 (*c*) is adopted, mere inactivity on the workman's part, and failure to serve a counter report to that obtained by the employer, justifies the latter in ending the weekly payments. If parity of reasoning is to hold, it is not easy to see why an assent, expressed to the employer as clearly as it was in the present case, should not bind the workman.

For these reasons, I am of opinion that the agreement referred to in the opening words of s. 14 need not fulfil the conditions of Sch. II., cl. 9, but, in such circumstances as obtained in the present case, is valid and binding upon the workman. The county court judge was right in his decision, and the appeal must be dismissed with costs.

SCRUTTON L.J. The workman in this appeal met with an accident on April 19, 1924, and was paid thirty shillings a week compensation, without any legal proceedings, until January 5, 1925. On that day, which was the day compensation was paid at the colliery, he brought to the colliery a certificate from his panel doctor that he had recovered. He was then paid thirty shillings for the last week and told it was the final payment and, according to his own evidence, he said "All right." The judge finds that he assented to the termination of compensation.

After some lapse of time the workman started arbitration proceedings to obtain compensation. The judge, after hearing

(1) [1925] 1 K. B. 346. (2) (1925) 18 B. W. C. C. 68.

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conflicting medical evidence, found that the workman was malingering, and was not incapacitated by the accident on January 5, 1925, or at any time after.

Counsel for the workman agreed that he could not claim compensation after the date of the award, but contended that under s. 14 of the Act of 1923 he was entitled to compensation from January 3, 1925, to the date of the award, when compensation was ended.

The respondents argued that the compensation was determined by agreement under s. 14; to this it was replied: (*a*) that there was no consideration for the agreement, if any, and (*b*) that the agreement, not being recorded, was void.

On the first contention there is, I think, some, though slight, consideration for the agreement in the fact that the employers paid the last week's contribution without requiring any evidence that the disability had existed during that week. If consideration was necessary, there was sufficient to support the agreement. On the second point, failure to record this kind of agreement does not affect its validity. This, I think, follows from the views expressed by all the members of the Court in *Guest, Keen & Nettlefolds* v. *Williams*. (1)

I desire to reserve the question of the liability of the employer where no agreement to terminate is proved, but he proves that in fact from the termination of payments the workman was not suffering from incapacity caused by the accident.

The appeal must be dismissed with costs.

SARGANT L.J. The main decision of the learned county court judge in this arbitration—namely, that the workman had recovered by January 5, 1925—was a decision of a question of fact, was obviously unappealable, and has not been appealed. We have only to consider a subsidiary question similar to that raised in *Davies* v. *Glyncorrwg Colliery Co., Ld.* (2)—namely, whether the workman is nevertheless entitled to intermediate weekly compensation from

(1) 18 B. W. C. C. 68. (2) [1925] 2 K. B. 339.

January 3, the date of stoppage, to November 10, 1925, the date of the hearing, on the ground that the compensation was stopped otherwise than in accordance with the provisions of s. 14 of the Workmen's Compensation Act, 1923. It is alleged by the employers not that the special procedure detailed in that section was followed, but that the stoppage took place in pursuance of an agreement to that effect within the opening words of the section.

The workman had brought to the company's cashier his own panel doctor's certificate to the effect that he had recovered and was fit for his old employment; he knew that after this certificate he would get no more compensation; he was told the then weekly payment was the last, and said "All right"; and he signed a receipt accordingly. In these circumstances the learned judge was bound to find, and did find, that the workman "agreed" to the ending of the weekly payment, in the sense that he quite understood and assented to this termination as the necessary result of the situation.

But it is argued for the workman that something more is required to constitute an agreement under s. 14—namely, that such an agreement should at least be positively enforceable as a legal contract, and must accordingly be made for consideration.

As to this point, I agree with the learned judge in the view that the word "agreement" in the section is satisfied by a deliberate assent such as was given here. It is clear that the object of the section was to prevent the difficulties in which workmen might be placed by the arbitrary withholding by employers of weekly payments pending the final determination of the workmen's rights: see *Pudney* v. *William France, Fenwick & Co.* (1); *Davies* v. *Glyncorrwg Colliery Co.* (2); and *Bent Colliery Co.* v. *O'Hare.* (3)

The mischief aimed at by the section obviously would not arise in the case of a deliberate assent by the workman to the cesser of compensation, and to require a legal contract sanctioning the cesser would be superfluous. It will be

(1) [1925] 1 K. B. 346. (2) [1925] 2 K. B. 339.
(3) 17 B. W. C. C. 424.

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noticed that the employers have only been relying on the assent as justifying the interim cesser of payment. It was never raised as an answer to the workman's general claim for compensation in the arbitration proceedings. Had he succeeded in establishing that claim, he would have been entitled to compensation not merely as from November 10, but as from the earlier date—namely, January 3.

Further, even if consideration is a necessary ingredient in an "agreement" under s. 14, I am not prepared to say that there was not any consideration here. In view of his own doctor's certificate, a doubt may well have existed whether the man was entitled to his weekly payment for the week ending on January 3, and the acceptance and discharge by the company of liability for that payment may well have been consideration for an abandonment of the hopeless claim, in view of the certificate, for a continuation of the payments.

As regards a further contention on the part of the appellant that an agreement under s. 14 must be recorded in order to be binding, I can find no requirement in s. 14 to that effect; and to imply such a requirement would, in my view, be inconsistent with the limited object of the section as previously indicated. But, even if such a requirement ought to be implied, non-compliance with it does not render the agreement nugatory: see *Guest, Keen & Nettlefolds* v. *Williams*. (1)

In my judgment, therefore, the appeal should be dismissed, with the usual consequences.

Appeal dismissed.

Solicitors for appellant: *Jackson & Jackson, for J. W. Fenoughty, Rotherham.*

Solicitors for respondents: *Peacock & Goddard, for Elliot Smith & Co., Mansfield.*

(1) 18 B. W. C. C. 68.

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VENN *v.* TEDESCO.

1926
March 29;
April 23.

[1922. V. 1274.]

Limitation of Action—Public Authority—Action under Lord Campbell's Act —Time Limit for bringing Action—Lord Campbell's Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 3—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*a*).

In an action under Lord Campbell's Act, 1846, against defendants to whom the Public Authorities Protection Act, 1893, is otherwise applicable, the time within which the action can be brought is that limited by the former and not that limited by the latter Act.

British Columbia Electric Ry. Co. v. *Gentile* [1914] A. C. 1034 followed.

FURTHER consideration of an action tried before McCardie J. and a special jury.

The plaintiff, Mary Christian Venn, suing on behalf of her son and daughter, brought this action under Lord Campbell's Act, 1846 (9 & 10 Vict. c. 93), against the defendants, James Massimo Tedesco and J. Elder, medical officers of the Croydon Borough Hospital, in respect of the death of her husband through the alleged negligence of the defendants. The defendants (inter alia) submitted that the action was barred by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), and that the more extended limit of time allowed by the Act of 1846 did not apply. The jury failed to agree on the merits, and McCardie J. reserved the question of law for further consideration.

The facts in detail and the arguments are set forth in the judgment.

Sir Henry Maddocks K.C. and *Mark Goodman* for the plaintiff.

Neilson K.C. and *Carthew* for the defendants.

April 23. McCARDIE J. read the following judgment: The point for my decision arises in an action brought by the plaintiff under Lord Campbell's Act, 1846, against the two defendants, who are medical men. The case was tried before me with the aid of a special jury. In the course of the

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hearing the defendants submitted that the action was barred by the Public Authorities Protection Act, 1893. Arguments were reserved till the conclusion of the trial. The jury failed to reach a unanimous decision in favour of the defendants and, therefore, I heard at a later date the submissions of counsel. I then reserved judgment, inasmuch as there seemed to be a conflict of authority on the point at issue.

A few facts only need be stated. The plaintiff sued on behalf of herself, her son and her daughter. The defendants were medical officers of the Croydon Borough Hospital and under the direct control of the borough of Croydon. In March of 1922 the plaintiff's husband, William Venn, became a patient at the hospital. During his stay he was under the care of the defendants. On April 26, 1922, Mr. Venn left the care of the defendants, for he was removed to the General Hospital, Croydon, in order to undergo an operation. The operation was performed on April 27, 1922. Mr. Venn died on June 15, 1922. The plaintiff asserted that the death of her husband was due to the negligence of the defendants whilst he was under their care up to April 26, 1922, and she claimed damages for herself and her two children. Now six months from April 26, 1922, would expire on or about October 26, 1922. The writ in the action was not issued till December 6, 1922. It is conceded that the defendants are within the class of individuals covered by the Public Authorities Protection Act, 1893. The point before me is whether this action must fail because it was not brought within the limits of time provided by the Act just mentioned. The plaintiff contends that she is entitled to the wider limits of time, that is twelve months, provided by s. 3 of Lord Campbell's Act, 1846. I may point out at once that inasmuch as Mr. Venn passed from the care of the defendants on April 26, 1922, it is clear that, had he lived and himself brought an action against the defendants for alleged negligence, time would have run against him under the Public Authorities Protection Act, 1893, as from that date, that is April 26, 1922, and a writ issued by him in December,

1922, would have been too late: see *Freeborn* v. *Leeming* (1) in the Court of Appeal. The material words of s. 1 (*a*) of the Public Authorities Protection Act, 1893, are these: "The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." The objects of the Act are well known. I need not state them; the words of the enactment are as broad as words can be. They are general and far reaching, and there is no hint of any exception with respect to proceedings under Lord Campbell's Act, 1846. The Schedule to the Act of 1893 shows the repeal of a large number of scattered statutory provisions. All these were revoked and a wide and general enactment was passed. Taken by itself this Act of 1893 would seem clearly to bar the plaintiff's claim here, inasmuch as the writ was not issued till more than six months had elapsed since the last "act, neglect, or default" that could be alleged against the defendants: see *Freeborn* v. *Leeming* (1), just quoted.

I now turn to Lord Campbell's Act, 1846. That Act was passed because at common law it was not a civil wrong to cause the death of a human being. I need not set out the well known provisions of the Act; the only material words I need cite are those in s. 3—namely, "Provided always .... that every such action shall be commenced within 12 calendar months after the death of such deceased person." The provisions of the amending Act of 1864 (27 & 28 Vict. c. 95) do not, I think, affect the point before me. It might well be thought that the two enactments of 1846 and 1893 are not necessarily antagonistic or inconsistent, but that they may properly be read together. If a defendant does not fall within the Public Authorities Protection Act, 1893, then the limit of time provided by Lord Campbell's Act would, it may well be said, apply, and a large field is left open to the broader time limit of the latter Act. If, however, a defendant falls within the Act of 1893, then he could be regarded as one of a special class to whom protection is given for special reasons, and therefore he should be able to rely on the

(1) [1926] 1 K. B. 160.

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particular Act passed for his benefit and should be entitled to invoke the narrower limit of time as a bar to the action. I realize that there may be cases of apparent hardship on such a construction of the Public Authorities Protection Act, 1893. Hardship, however, is a matter for Parliament. If the Act of 1893 is not allowed to operate in cases of death and if the limits of time in such cases are fixed only by Lord Campbell's Act, then it seems to follow that if there be alleged negligence and the individual said to be injured thereby lives for several years ere death comes about, then so great a period of time may elapse as to defeat in toto the well known objects of the Act of 1893. A plaintiff widow could then issue a writ after the passage of years had destroyed or lessened a defendant's opportunity for meeting the case and for dispelling the allegation against him. The case before me, however, cannot be decided on general consideration or on broad rules of construction. There is much authority to consider; the point is involved in a network of decisions.

How do those decisions stand? In *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1) the alleged negligence which caused death was on October 31, 1898. The writ was not issued till May 19, 1899, that is, more than six months from the negligence. It was held by Darling J. and Bigham J. that the claim of the widow was barred. I confess myself unable to follow all the reasoning of the Divisional Court, but in substance that Court said that the Act of 1893 did not cut down the limit of time fixed by Lord Campbell's Act, except as to certain classes of persons, that is, the particular classes who fell within the Act of 1893. Darling J. also observed that the two Acts did not conflict in any way. If that decision is still good law it bars the plaintiff in this action now before me. It is of interest to note that the learned editors of the Annual Practice, 1926, p. 297, when dealing with actions under Lord Campbell's Act, use these broad words: "Under the Public Authorities Protection Act time runs from the date of the accident." I now refer to the

(1) [1900] 2 Q. B. 454.

important case of *Gawley* v. *Belfast Corporation* (1), where an action was brought by a widow under Lord Campbell's Act. The facts were these. Her husband was injured on June 13, 1906. He brought an action against the Belfast Corporation on July 30 of that year. He died on February 28, 1907. His widow then brought her action in April, 1907. The defendants pleaded that her action had not been brought within six months from the alleged act of negligence, and that it was therefore barred by the Public Authorities Protection Act, 1893. The point was argued first before Palles C.B. (a most weighty Irish judge) and Andrews J. They held that the defendants' plea was valid, and that the action failed. The plaintiff then went to the Court of Appeal, and the question was considered by the Lord Chancellor of Ireland (Sir Samuel Walker) and by FitzGibbon and Holmes L.JJ. That Court unhesitatingly and unanimously upheld the decision of Palles C.B. and Andrews J. The keynote of the judgment is shown by a sentence in the Lord Chancellor's decision when he says (2): "The policy of the Act of 1893 is to protect public bodies from the consequences of torts committed by them after six months have passed." FitzGibbon L.J. said (3): "[Time] was running against the injured man in his lifetime, and it ran on against his personal representative after his death"; and Holmes L.J. said (4): "The effect of [the Act of 1893] is in my opinion to strike out the proviso as to twelve months after the death in [Lord Campbell's Act], and to substitute for it six months after the act, neglect, or default." Here then is a body of authority, both English and Irish, adverse to the present plaintiff. Almost the same view as to the general effect of the Act of 1893 was apparently expressed by Bankes L.J. in *Freeborn* v. *Leeming* (5), when he said: "It is obvious from a perusal of the Schedule containing the enactments repealed, which go back as far as the reign of Queen Elizabeth, that the Legislature intended in the case of actions against public

(1) [1908] 2 I. R. 34.
(2) Ibid. 40.
(3) [1908] 2 I. R. 42.
(4) Ibid. 44.
(5) [1926] 1 K. B. 169.

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authorities not only to substitute one time limit for all existing time limits, but by adopting a new definition of what constitutes that limit to modify the existing law upon the subject." Scrutton L.J., by implication, and Atkin L.J., by express words, indicated their agreement with the judgment of Bankes L.J. There is a further decision which, unless it can be distinguished, is also adverse to the plaintiff. I refer to *Williams* v. *Mersey Docks and Harbour Board* (1) in the Court of Appeal, which was an action by a widow under Lord Campbell's Act. There the plaintiff's husband having, in 1902, sustained injuries through, as was alleged, the negligence of the defendants, died of those injuries in 1904. The plaintiff, the widow, then began her action for damages. It was held by the Court of Appeal (Mathew and Cozens-Hardy L.JJ.) that her action was barred by the Public Authorities Protection Act, 1893. The ratio of the judgments was not quite clear. For example, in one passage Mathew L.J. would appear to take a view of the Act of 1893 like to that taken by the Irish Courts in *Gawley's* case (2) and by Bankes L.J. in *Freeborn's* case (3), for he says (4): "In this case no action was brought by the deceased man in respect of his injuries, and the present action is brought by his widow after the lapse of a period much longer than six months after the act, neglect, or default complained of."

Sir Henry Maddocks, however, in his able argument on behalf of the plaintiff emphasized that in *Williams'* case (1) the injured man lived more than six months after the negligence complained of, and that therefore he had wholly lost any right of action which he, the injured man, might have possessed. It is indeed true that Mathew L.J. in his judgment (5) points out that if a person injured has, for example, compromised his claim against the defendant by the receipt of compensation, his widow would thereby be debarred from action under Lord Campbell's Act. As Mathew L.J. put it (5): "The cases appear to establish the

(1) [1905] 1 K. B. 804.
(2) [1908] 2 I. R. 34.
(3) [1926] 1 K. B. 169.
(4) [1905] 1 K. B. 807.
(5) [1905] 1 K. B. 808.

general principle that, where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative. In this case the deceased could not have maintained an action against the defendants at the time of his death." Cozens-Hardy L.J. says (1): "In the present case the deceased could not at the date of his death, or at any time after the lapse of six months from his injury, have maintained an action in respect of that injury against the defendants; and therefore his representative cannot maintain this action."

It may well be that Sir Henry Maddocks is correct in his submission as to the true ratio of *Williams'* case (2), though some of the observations would seem clearly to go beyond that ratio. If Sir Henry Maddocks be right then *Williams'* case (2) is not directly adverse to the present plaintiff.

A great deal of the case law with respect to the interrelationship of Lord Campbell's Act and the Public Authorities Protection Act is in a state of some doubt. No tabula rasa exists on which a clear and logical decision can be written. I must now refer to the leading decision relied on by counsel for the plaintiff—namely, *British Columbia Electric Ry. Co.* v. *Gentile.* (3) That case was before the Privy Council. It was an appeal from the Court of Appeal of British Columbia. In that Province two Acts were in force—namely, the Families Compensation Act, 1911 (2 Geo. 5, c. 82, Revised Statutes), which in substance was the same as Lord Campbell's Act, and gave the same limit of time for bringing an action, and the Consolidated Railway Companies Act, 1896, of British Columbia (59 Vict. c. 55), which, for the purpose of the case, can be regarded as in substance the same as the English Public Authorities Protection Act, 1893. The action was by the widow. Her husband had been knocked down and instantaneously killed by one of the defendants' cars, and negligence was alleged and proved. The action was begun by the widow more than six months, but less than twelve months, after the accident and death. It was held

(1) [1905] 1 K. B. 809. (2) [1905] 1 K. B. 804.
(3) [1914] A. C. 1034.

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by the Privy Council that the action was not barred, inasmuch as the time limit was fixed by the Families Compensation Act, 1911, and not by the Consolidated Railway Companies Act, 1896. The English decisions were fully reviewed by counsel. The advice of the Privy Council was delivered with fullness by Lord Dunedin. I need not analyse the judgment in detail. Suffice it to say (*a*) that the Board expressly disapproved of the decision in *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1), and by that they expressed the view that Lord Campbell's Act and the corresponding British Columbia Act gave what has been described as a "new cause of action." I need not examine that phrase "new cause of action." If I may respectfully say so I prefer the phrase of Lord Blackburn in *Seward* v. *The Vera Cruz* (2), when he speaks of a "totally new action." It is a matter, perhaps, of regret that in discussing the phrase, "new cause of action," in past decisions too little attention has been given to the observations in *Cooke* v. *Gill* (3) and *Read* v. *Brown*. (4) Now there can, I think, be no doubt that *Gentile's* case (5) is adverse to the present defendants, and precludes me from ruling that the plaintiff here was out of time. The question is whether or not I should follow *Gentile's* case (5) rather than the weighty judgments in the Irish Courts in *Gawley's* case (6) and the views of Darling and Bigham JJ. in *Tolworth's* case (1), I should point out that although *Gawley's* case (6) was cited and relied upon by counsel in *Gentile's* case (5), yet it is not mentioned in the judgment of the Board. If the point before me depended on *Gentile's* case alone, I should, with the utmost diffidence and with the deepest respect to the Privy Council, hesitate to follow the opinion of the Board in that case, opposed as it is to so substantial a body of authority. It is to be remembered that the High Court of this country, though it yields the fullest regard to the opinions of the Privy Council, is not bound by its decisions. In *Leask* v. *Scott* (7)

(1) [1900] 2 Q. B. 454.
(2) (1884) 10 App. Cas. 59, 70.
(3) (1873) L. R. 8 C. P. 107.
(4) (1888) 22 Q. B. D. 128.
(5) [1914] A. C. 1034.
(6) [1908] 2 I. R. 34.
(7) (1877) 2 Q. B. D. 376, 380.

Bramwell L.J. in referring to a Privy Council decision said: "We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot." In *Dulieu* v. *White* (1) Kennedy J. said: "A judgment of the Privy Council ought of course to be treated by this Court as entitled to very great weight indeed; but it is not binding upon us." He was referring to the decision of the Privy Council in *Victorian Ry. Commissioners* v. *Coultas*. (2) Phillimore J. also said in *Dulieu* v. *White* (3), in referring to the *Coultas* (2) decision: "This is an authority to be treated with the utmost respect, but no more binding on us even as to the res decisa than it was upon the Exchequer Division in Ireland. Still less are the special reasons for the decision binding." The further question arises: Does *Gentile's* case (4) stand alone? The decision in that case of Lord Dunedin, Lord Moulton, Lord Parker of Waddington and Sir George Farwell, was delivered by Lord Dunedin.

In *Union Steamship Co. of New Zealand* v. *Robin* (5) the point was not identical with that in *Gentile's* case (4), but the Privy Council in pronouncing their decision referred to *Gentile's* case, and expressly approved it as an authoritative statement of the principles with respect to the time limit for actions under Lord Campbell's Act and similar enactments. The Board consisted of Viscount Haldane, Lord Buckmaster, Lord Dunedin and Lord Atkinson. In *McColl* v. *Canadian Pacific Ry. Co.* (6) the point again was not similar to that in *Gentile's* case (4), but the latter case was referred to with apparent approval by the Board, consisting of Viscount Cave, Lord Parmoor and Duff J. If I may most respectfully say so I find it somewhat difficult to reconcile some of the observations with respect to Lord Campbell's Act with the ratio of the decision in *Gentile's* case (4) or with *Williams* v. *Mersey Docks*. (7) There is

(1) [1901] 2 K. B. 669, 677.
(2) (1888) 13 App. Cas. 222.
(3) [1901] 2 K. B. 683.
(4) [1914] A. C. 1034.
(5) [1920] A. C. 654.
(6) [1923] A. C. 126, 133.
(7) [1905] 1 K. B. 804.

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thus a potent aggregate of judicial opinion in the Privy Council decisions which favours the arguments of Sir Henry Maddocks for the plaintiff here.

I realize at this stage of the judgment the importance of the words of Lindley L.J. in *The City of Chester* (1), when he said: "It is true that the decisions of the Privy Council are not theoretically binding on this Court; but in case of mercantile or Admiralty law, where the same principles are professedly followed in the Colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country." I most respectfully agree with Lord Lindley's words, and I think that his observations may well apply with equal force to the construction of statutes which possess substantial similarity and which prevail both here and in the Dominions. It is important that the same construction should be adopted in all parts of the Empire.

The legal position for the present plaintiff is much strengthened by the fact that in *Nunan* v. *Southern Ry. Co.* (2) the Court of Appeal, in dealing with a question not wholly dissimilar to that now before me, apparently treated *Gentile's* case (3) as an authority to be acted on by them. Whether *Nunan's* case (2) is quite reconcilable with *Williams* v. *Mersey Docks* (4) and other decisions is a matter that I need not now discuss. *Williams'* case (4) is not referred to in the judgment. I may add that, so far as it goes, the implication of *Tuckwood* v. *Rotherham Corporation* (5) seems also to favour the plaintiff here. The result, therefore, is that, by reason of the weight of Privy Council authority and also by reason of the recognition of *Gentile's* case (3) by the English Court of Appeal in *Nunan* v. *Southern Ry. Co.* (2) I must rule against the defendant's contention, and I must hold that the plaintiff's claim is not barred by the Public Authorities Protection Act, 1893.

(1) (1884) 9 P. D. 182, 207.
(2) [1924] 1 K. B. 223.
(3) [1914] A. C. 1034.
(4) [1905] 1 K. B. 804.
(5) [1921] 1 K. B. 526.

The observation of Bankes L.J. in *Freeborn* v. *Leeming* (1) must, I think, be deemed inapplicable to actions under Lord Campbell's Act, and apparently *Gawley's* case (2) cannot now be regarded as an effective authority in the English Courts. If the point now before me is to be decided otherwise than as I now feel bound to decide it, that decision can, apparently, be given by the House of Lords only.

Such is the view I must take of the main point of law argued before me, but I ought, ere concluding this judgment, to refer briefly to another point raised on the plaintiff's behalf —namely, that, inasmuch as the defendants' counsel, at the first trial of this action before the Lord Chief Justice and a special jury, stated that he did not seek to rely on the Public Authorities Protection Act, 1893, he was therefore precluded from raising the point before me on the second trial of the action. I am unable to agree with that contention. The point was one of law only. It involved no evidence, and the facts on the point were not only admitted, but were actually pleaded in the statement of claim itself. There is, I think, no estoppel in the matter. The trial before me was a de novo hearing, and the defendants were entitled to raise before me the point pleaded in their statement of defence. My recollection is that this question has been decided by the Court of Appeal as I now decide it, though I am unable to find a reported decision on the matter. The cases quoted in the Annual Practice, 1926 ed., p. 1154, tend, I think, to support the view I now express.

The result of my decision is that, if the plaintiff so desires, the case must proceed to a third trial before a judge and a special jury.

Judgment accordingly.

Solicitors for plaintiff: *Arthur S. Joseph & Co.*

Solicitors for defendants: *Le Brasseur & Oakley, for John M. Newnham, Croydon.*

(1) [1926] 1 K. B. 169. (2) [1908] 2 I. R. 34.

W. L. L. B.

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Feb. 10.

[IN THE COURT OF APPEAL.]

LIGHT *v.* WILLIAM WEST AND SONS, LIMITED.

[1924. L. 1299.]

Practice—Costs—Action on Contract in High Court—Judgment directing an Account—Award for less than 100*l.—Application for Costs on High Court Scale before Completion of Order—Jurisdiction—County Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *s.* 11*—Liberty to apply—"Costs reserved."*

In an action upon a contract in the High Court judgment was given for the plaintiff for an amount to be ascertained on taking an account between the parties, with costs of the action. This judgment was dated and entered on April 8. The referee took the account and ascertained the amount to be 83*l.* 10*s.*, and on November 29 indorsed the order accordingly. On the next day and before final entry of the completed order, the judge, upon the plaintiff's application, ordered the costs to be taxed on the High Court scale. Against this order the defendants appealed :—

Held, that in the circumstances the judge had jurisdiction under s. 11 of the County Courts Act, 1919, to award costs on the High Court scale, for until the result of the amount was ascertained the question of costs could not be finally determined.

An order which is not final, but directs an account or further proceedings to be taken, should expressly reserve the question of costs.

Appeal from a decision of Rowlatt J. in the following circumstances :—

The plaintiff brought this action alleging that he had been employed by the defendants as their agent, but had been wrongfully dismissed, and so prevented from earning allowances and commissions ; and he claimed an account, damages and other relief. The defendants alleged that certain conditions attached to the plaintiff's employment had not been fulfilled, and they counterclaimed for moneys due from the plaintiff in respect of goods supplied to him.

After a trial lasting several days Rowlatt J. ultimately came to a conclusion in favour of the plaintiff, and an order was made and entered on April 8, 1925 : "That judgment be entered for the plaintiff for an amount to be ascertained (if not agreed) by a Referee to be agreed between the parties, such account to be taken up to and including 31st August,

1923, with costs of the action. The counterclaim dismissed with costs. It is this day adjudged that the plaintiff recover from the defendants the amount ascertained (if not agreed) by Referee as above directed and costs to be taxed including the costs of the counterclaim." The order was sealed on April 17.

The parties did not agree the amount, and the matter was referred to Master Sir Willes Chitty to assess the amount for which judgment should be entered. The Master took the account, and certified as follows: "The parties being unable to agree the amount for which judgment is to be entered, and having agreed that I should act as the Referee to ascertain that amount, I find and certify that the amount ascertained pursuant to the above order is 83*l.* 10*s.*" Pursuant to that certificate, the Master on November 29, 1925, made the following indorsement on the order: "And it having been agreed between the parties that Master Sir Willes Chitty should assess the said amount for judgment And the Master by his finding filed the 2nd day of December 1925 (1) having certified the amount at 83*l.* 10*s* It is this day adjudged that the plaintiff recover from the defendants 83*l.* 10*s.* and costs to be taxed."

On the next day, November 30, and before the final entry and completion of the order, which did not take place until December 2, 1925, the plaintiffs applied to Rowlatt J. for costs on the High Court scale. Upon that application, Rowlatt J. in his judgment said that it would have been the proper thing for him to have said expressly "liberty to apply," and not for him to have made a hypothetical order; that there ought to have been "liberty to apply," and that in a case of that kind liberty to apply was really or necessarily implied; but if not, then that there had been an accidental omission within Order XXVIII., r. 11, and his Lordship treating himself as having jurisdiction, came to the conclusion that the case was one fit to be tried in the High Court, and he gave the plaintiff costs on the High Court scale.

(1) This was the date appearing in the Order as entered and completed on December 2, 1925.

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The order was then completed by the following addition: "And this action having been mentioned before the Hon Mr. Justice Rowlatt on the 30th November, 1925, the judge directed that the costs of the action be taxed on the High Court scale. Leave to appeal if necessary." The order was finally entered on December 2, 1925.

The defendants appealed against the later decision of Rowlatt J.

The appeal was heard on February 10, 1926.

J. G. Hurst K.C. and *Caporn* for the appellants. There is no jurisdiction for a judge when it has been discovered that less than 100*l.* has been recovered, to alter in any way a final judgment which has been drawn up and entered, and to say that the action was fit to have been brought in the High Court.

[LORD HANWORTH M.R. The County Courts Act, 1919, s. 11 (1), relates to the question whether Rowlatt J. had power to make the order. Under that section the judge if satisfied that there was sufficient reason for bringing the action in the High Court may make an order allowing costs on the

(1) The County Courts Act, 1919, s. 11, provides:—

"(1.) Where an action is brought in the High Court which could have been commenced in a county court, then, if the plaintiff . . . . recovers, in the case of an action founded on contract, a sum of forty pounds or upwards but less than one hundred pounds, ... he shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in a county court, and where a plaintiff is entitled to costs on a county court scale only the taxing master shall have the same power of directing on what county court scale and under what column in the scale costs are to be allowed and of allowing any items of costs as the judge would have had if the action had been brought in a county court:

Provided that:—

(i.) in any such action, whether founded on contract or tort, the court or a judge, ... if satisfied that there was sufficient reason for bringing the action in the High Court . . . . may make an order allowing the costs or any part of the costs thereof on the High Court scale or on such one of the county court scales and under such one of the columns in the scale as he may direct; and

(ii.) . . . .

(2.) This section applies only to the costs of the proceedings in the High Court."

High Court scale. Until the judge knows the amount awarded by the referee, he has not the materials upon which to make an order for costs.]

But in this case the order had been already passed and entered. In *Reigate Corporation* v. *Wilkinson* (1), where the order had been passed and entered, Eve J. decided that he had no jurisdiction to give costs on the High Court scale. In giving judgment for costs in the first instance in the present case Rowlatt J. exhausted his jurisdiction, and could not afterwards alter the order which was dated and entered on April 8, and sealed on April 17, or go behind it: *Wimshurst, Hollick & Co.* v. *Barrow Shipbuilding Co.* (2); *Bentley* v. *O'Sullivan.* (3)

This is not a case which came under the slip rule, Order XXVIII., r. 11. There was no such omission here as there was in *Doswell* v. *Norton.* (4)

Merriman K.C. and *H. C. Marks* for the respondent were not called upon.

LORD HANWORTH M.R. I am of opinion that the order of Rowlatt J. was right. The point raised may be of some practical importance. [His Lordship stated the facts and the order made on April 8 and continued:] That was the order made on April 8. What was the nature of that order? It appears to me that it was interlocutory in part and final in part. The plaintiff was to recover on the claim, and the counterclaim was to be dismissed, and on both those issues the plaintiff was to have the costs. So far it is a final order. But it was interlocutory as to the further proceedings for the purpose of taking the account between the plaintiff and defendants.

That there are such orders is clear. Without going more deeply into the Rules of the Supreme Court, there is Order XXVII., r. 6, which contemplates that there may be a claim for a debt or a liquidated demand and also for pecuniary damages only, and that the plaintiff may enter final judgment

(1) [1920] W. N. 150.
(2) (1877) 2 Q. B. D. 335.
(3) (1925) 133 L. T. 189.
(4) (1902) 18 Times L. R. 228.

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for the debt or liquidated demand and also enter interlocutory judgment for the damages.

More than that, under Order XXXVI., r. 57, in an action where the amount of damages sought to be recovered is substantially a matter of calculation, it is not necessary to issue a writ of inquiry, but the judge may order that the amount for which final judgment is to be entered shall be ascertained by an officer of the Court, and then such officer shall indorse upon the order for referring the amount of damages to him the amount found by him, and shall deliver the order with such indorsement to the person entitled to the damages.

What happened in this case was that the parties agreed to take the case before Master Chitty for the ascertainment of the damages, and he, acting in accordance with Order XXXVI., r. 57, indorsed on the order referring the amount of damages to him, the amount found by him, and then delivered the order with that indorsement to the person entitled to the damages. The Master's indorsement was made on November 29, and the parties applied to Rowlatt J. on November 30, before the final entry and completion of the judgment, which took place on December 2.

Upon that application Rowlatt J. came to the conclusion that, inasmuch as his judgment given at the trial involved further proceedings in execution of the judgment, it was a case where liberty to apply was implied, and on that he made an order for costs on the High Court scale. There seems to be something to be said for that course, but I prefer to decide the point on another ground—namely, that until the amount of damages was found, s. 11 of the County Court Act, 1919, did not come into play. If the plaintiff had recovered 100*l.* he would have had costs on the High Court scale, but when the damages were ascertained at 83*l.* 10*s.* then, and not until then, s. 11 of the Act of 1919 came into play, and left it open to the judge to say whether the costs should be on the High Court or on the County Court scale. [His Lordship read the section and continued:] That section contains a proviso which enables the judge, at any

time before entry of final judgment, for sufficient cause to give costs on the High Court scale. It appears to me that it would be wrong to leave out that proviso, and I think that we should treat s. 11 as being in operation, and always in operation, right away from the original judgment, and as coming into play according as the amount of damages is ascertained by the referee as being above or below 100*l.* But as soon as the section comes into play, so also does the proviso.

Rowlatt J., upon the application made to him before the final judgment was entered, came to the conclusion that he could make the order which he did. I agree with him that if he had made an anticipatory order in April, he might have made an order that subsequent events might have caused him to regret. Perhaps the better course would be to wait until the materials are ascertained upon which the right order can be made, and for the judge to say in the first instance that costs are reserved. But in the present case, I am of opinion that there was still a discretion in the learned judge and that his order was right. The appeal must be dismissed.

SCRUTTON L.J. I agree that the order of Rowlatt J. must stand, but I think that the trouble arose from the fact that he made an unsatisfactory order in the first instance. The learned judge decided that there had been a breach of contract involving a question of damages, and he ordered an account to be taken, and gave a judgment for the plaintiff with the costs of the action, without knowing what the result of the account would be or whether it would produce any result. That was not a satisfactory order, and was not in accordance with the practice in either Division. In cases of this nature it is very desirable to reserve the costs of taking the account.

In the present action the question of damages was referred to Master Chitty, and he found the damages at 83*l.* 10*s.*, and on that, if nothing more had happened to the judge's order, only costs on the county court scale would have been allowed. So before the final order had been entered and as soon as the

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Scrutton L.J.

Master had indorsed the amount of damages, Rowlatt J. was asked to certify that the costs should be on the High Court scale, and the grounds upon which he did so were that there was an implied liberty to apply, or if not, that there was an accidental omission, which could be rectified under the slip order, Order XXVIII., r. 11.

The way I prefer to put it is thus—that when the matter is referred to the Master the amount of damages is left blank, and when the Master has given his certificate then the blank is filled in, and the judgment is treated as final, subject, however, to the provisions of the County Court Acts.

I do not see how you can settle about the costs or make any application about them until the amount of the damages has been ascertained. The judge cannot exercise his power under the County Court Act, 1919, until the amount of damages is known, and if as soon as the amount is ascertained and before the final judgment is entered, a reference is made to the judge, I think that he still has jurisdiction to entertain the application, because until the certificate is made he does not know the result of the account. It seems to me to be idle to suggest that the jurisdiction of the judge arose before he knew what was going to happen.

In my opinion Rowlatt J. had jurisdiction as to the costs, because the application was made to him before the final judgment was entered, and I hold that his power of deciding about the scale of costs did not arise until he knew what was the amount of the damages resulting from the account. The appeal must be dismissed.

SARGANT L.J. I agree. I should like to adopt the whole of the reasoning of Rowlatt J. except the suggestion at the end of his judgment, that the order might be amended under the slip order. For I think that he was right on the main grounds—namely, that it would not have been possible for him to deal with the question of costs hypothetically—and further I indorse what he has said with regard to the implication of "liberty to apply" in an order of this kind. In his judgment he has referred to the well known remark

of Fry J. in *Fritz* v. *Hobson* (1): "According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said), all orders of the Court carry with them in gremio liberty to apply to the Court," and that observation was commented upon and corrected by Chitty J. in *Penrice* v. *Williams* (2), where he said that that would not be the case generally, but would apply to cases where the order was not final, but directed further steps to be taken. In such a case the Court has not lost its seisin of the matter, and it has jurisdiction to make an order as to matters arising out of the taking of the accounts or inquiries.

I should be sorry to think that there was any difference between the Chancery and King's Bench Divisions in this respect, but I think that as the orders of the King's Bench Division are simpler than those of the Chancery Division it has not been so usual to insert in the former "liberty to apply" as it has been in those of the Chancery Division.

In the present case an account was ordered to be taken, and to my mind that implies "liberty to apply." Further, I think, that having regard to the powers given to the Court by the County Courts Act, 1919, s. 11, there is an additional reason for saying that those powers cannot arise before the time when the circumstances have been found which make the decision of the Court upon the question of costs a necessary decision. What would have happened if the application had not been made until the entry of final judgment in accordance with the Master's certificate I do not know, but it shows the advantage of promptitude in such applications.

I think, however, that the learned judge was justified in dealing with the new position which had arisen owing to the damages being ascertained at so small an amount, and that he had jurisdiction to make the order.

Appeal dismissed.

Solicitors for appellants: *Caporn & Campbell, for Bowman & Elkins, Birmingham.*

Solicitors for respondent: *W. H. Smith & Son.*

(1) (1880) 14 Ch. D. 542., 561. (2) (1883) 23 Ch. D. 353, 356.

R. M.

1926
Feb. 22.

COMMISSIONERS OF INLAND REVENUE *v.* BRIGADIER-GENERAL D'EWES COKE.

SAME *v.* WRIGHT.

Revenue—Super Tax—Assessment—Shareholder in Company—Offer to of new Shares fully paid up—Optionto ta ke Shares or Money—Distribution of accumulated Profits—Capital or Income—Liability to Super Tax. —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule D.*

A company having a sum consisting of undivided profits standing to the credit of its reserve fund passed resolutions that its capital should be increased by the creation of new shares, and that it was desirable to capitalize the said sum and make it available for distribution among the shareholders as capital free from income tax; and further resolutions pursuant to which the said sum was applied in payment up of the new shares, and these shares were offered to the shareholders in proportion to their existing shares with an option either to accept the new shares in whole or part or their value in cash. A shareholder having accepted some of the new shares offered to him and received a sum of money representing the value of the others:—

Held, that these shares and that sum of money were income and not capital of the shareholder, and that he was liable to super tax in respect of them.

Inland Revenue Commissioners v. *Blott* [1921] 2 A. C. 171 and *Bouch* v. *Sproule* (1887) 12 App. Cas. 385 distinguished.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

Previously to August 27, 1919, Brigadier-General d'Ewes Coke (hereinafter called "the respondent") was the holder of 1500 ordinary shares of 5*l.* each in the Pinxton Collieries, Ld. (hereinafter called "the company"), the capital of the company then being 180,000*l.*, divided into 18,000 ordinary shares of 5*l.* each and 18,000 preference shares of 5*l.* each. The company made up its accounts to September 30 in each year, and the profits were assessed to income tax. At September 30, 1918, the company's balance sheet showed a reserve fund of 125,000*l.* and a balance standing to the credit of profit and loss of upwards of 44,500*l.* after payment of dividends. The said 125,000*l.* represented accumulated profits of the company's trade, and had been built up by the setting aside from time to time by the directors under

the powers in the articles of association of portions of the company's profits.

In August, 1919, a circular letter was addressed by the directors to the shareholders containing proposals for increasing the company's capital by the creation of additional shares to be offered to the shareholders by way of bonus, and for the adoption of new articles of association to enable the issue of the bonus shares to be made, and giving notice of a general meeting for the effecting of these purposes.

On August 27, 1919, an extraordinary general meeting of the company was held, at which the proposals contained in that letter were carried out as follows: (*a*) A special resolution was confirmed that each of the existing 5*l.* ordinary and preference shares should be divided into five fully paid up ordinary and preference shares of 1*l.* each respectively; and that the new articles of association should be approved and thereby adopted as the articles of association of the company; (*b*) resolutions were passed (1.) that the capital of the company be increased from 180,000*l.* to 300,000*l.* by the creation of 110,000 ordinary shares of 1*l.* each ranking for dividend and in all other respects pari passu with the existing ordinary shares, and 10,000 6 per cent. cumulative preference shares of 1*l.* each ranking pari passu with and having the same priorities and subject to the same restrictions and limitations as the existing cumulative preference shares, and (2.) that the directors be authorized to do what was necessary in connection therewith; (*c*) resolutions were passed (i.) that it was desirable to capitalize the sum of 90,000*l.*, part of the undivided profits, standing to the credit of the reserve fund, and that the directors be authorized to withdraw that sum from the reserve fund, so that it might be available for distribution among the shareholders as capital free of income tax; (ii.) that the directors be authorized to apply that 90,000*l.* in payment up of 90,000 new ordinary shares in the company of 1*l.* each credited as fully paid, which new shares should in the first instance be offered at par to all the holders of ordinary shares in proportion to the number of shares held by them respectively on the day preceding the

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meeting, that was to say, that each holder of ordinary shares might take one new ordinary share of 1*l.* credited as fully paid up for every one ordinary share of 1*l.* fully paid held by him; (iii.) that if any shares offered to a member should be declined or not accepted within fourteen days from the service of notice specifying the number of shares to which such member was entitled, the member should be entitled to receive cash for the full nominal amount of the new shares so declined or not accepted by him, and the shares so declined or not accepted might be disposed of as the directors thought fit.

Pursuant to these resolutions a circular letter dated August 28, 1919, was sent by the directors to each of the shareholders, which was as follows:—

"Pinxton Collieries, Ltd.

Issue of 90,000*l.* new capital.

Dear Sir (or Madam),

OFFER.—In pursuance of the extraordinary resolutions of the company passed on the 27th day of August, 1919, for the creation and offer to the holders of ordinary shares of the company of 90,000 new ordinary shares of 1*l.* each to rank pari passu with the existing 90,000 ordinary shares of the company, the directors now offer to you of such new ordinary shares of 1*l.* each (fully paid) as capital . . . . *l.* the full nominal amount of such shares, is equal to the capitalised portion of the reserve fund to which you are entitled in pursuance of the above-mentioned resolutions.

OPTION.—You and/or your nominees or nominee may accept the new ordinary shares hereby offered to you in whole or part. If this offer is not so accepted before the 12th day of September, 1919, it will be deemed to be declined; and any shares which shall not be accepted or which shall be so deemed to be declined will be disposed of by the directors in such manner as they think most beneficial to the company, and you will be paid cash for the full nominal amount of the shares not accepted by you or your nominees.

ACCEPTANCE.—If you yourself accept the new ordinary shares in whole or part, a letter of acceptance in the form of

that now enclosed and coloured pink should be filled up and signed by you. If it be desired that all or any of the new ordinary shares hereby offered to you shall be issued to a person or persons nominated by you, a nomination and acceptance in the form of that now enclosed and coloured yellow should be filled up and signed by you or your nominee or nominees. In either of the foregoing cases the letter of acceptance should be sent to the company at its registered address . . . . on or before the 11th day of September, 1919.

REFUSAL.—If you or your nominees decline to accept all or any of the new ordinary shares hereby offered to you, it will facilitate business if you will fill up, sign, and send to me before the 12th day of September, 1919, the form of renunciation now enclosed and coloured blue. On receipt of such notice of refusal cheque for the above-mentioned amount of the bonus payable to you will be sent in exchange.

By order of the Board of Directors,

(Sgd.) A. Millhouse, Secretary."

The respondent, as the holder of 7500 ordinary shares of 1*l.* each, received a copy of the last-mentioned letter offering him a like number of new shares, and in the exercise of the option given to him by the letter he accepted 2500 new ordinary shares thereby offered to him and declined the remaining 5000 of these shares. The company then paid to the respondent 5000*l.*, being the full nominal amount of the said 5000 shares not accepted by him.

Of the total 90,000 new ordinary shares offered by the company, 81,625 were accepted by and allotted to the shareholders, and the balance of 8375 shares had not been issued.

The total amount of cash received by shareholders in respect of new ordinary shares not accepted by them was 8375*l.*

The balance sheet of the company as at September 30, 1919, showed that the reserve account had been reduced by 90,000*l.*, which had been applied as to 81,625*l.* thereof to the issue of shares in pursuance of the extraordinary resolution aforesaid, and as to 8375*l.* thereof in payment of cash in pursuance of the said resolutions. The balance sheet also showed that the nominal capital had been increased in

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accordance with the said resolution, and the paid up capital on the ordinary shares was shown as 171,625*l.*, an increase of 81,625*l.*, representing the amount of the ordinary shares actually accepted by the shareholders.

There was no official Stock Exchange quotation for the shares of the company. In the two years preceding October, 1919, no sales of shares took place. In October, 1919, some shares were sold, and realized 24*s.* 6*d.* per share.

In making his return for super tax for the year ending April 5, 1921, the respondent did not include the value of the 2500 new ordinary shares of the company which were allotted to him or the 5000*l.* received by him in the circumstances above set out. An additional assessment to super tax for that year was accordingly made upon the respondent under the provisions of the Income Tax Acts in the sum of 8231*l.*, made up of 7500*l.* in respect of the said new ordinary shares allotted to him, and the said sum received by him, plus 731*l.* in respect of income tax thereon.

The respondent appealed against that additional assessment to the Special Commissioners.

It was contended before the Special Commissioners on behalf of the respondent that the distribution of shares or the nominal value thereof was a distribution of capital and not of income, that upon the facts proved there had been a bona fide issue of capital, and that the assessment should be discharged.

It was contended on behalf of the Inland Revenue Commissioners, the now appellants, that upon the facts proved the case was distinguishable from *Inland Revenue Commissioners* v. *Blott* (1) and *Inland Revenue Commissioners* v. *Greenwood* (1), in that in this case the shareholders were given a real option to receive cash, that the distribution of shares or the nominal value of the said shares in cash was a distribution of accumulated profits, and that the shares received by the respondent represented income in the hands of the respondent, in respect of which the respondent was assessable to super tax, and that the assessment should be confirmed.

(1) [1921] 2 A. C. 171.

The Commissioners were of opinion that the case was governed by *Inland Revenue Commissioners* v. *Blott* (1) and *Inland Revenue Commissioners* v. *Greenwood* (1), and they accordingly discharged the assessment.

The case of *Commissioners of Inland Revenue* v. *Wright* was also a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, which raised the same question. Previously to August 27, 1919, the respondent, Mr. Tom Wright, was the holder of 1100 ordinary shares of 5*l.* each in the above mentioned company, the Pinxton Collieries, Ld. By the special resolution of that date these shares were divided into 5500 ordinary shares of 1*l.* each. In the exercise of the option given to him by the circular letter of August 28, 1919, the respondent accepted 5500 new ordinary shares thereby offered to him. In making his return for super tax for the year ending April 5, 1921, the respondent did not include the value of the said 5500 new ordinary shares, and an additional assessment was accordingly made upon him in respect thereof—that is to say, in the sum of 5500*l.*, plus 536*l.* income tax thereon, making in all 6036*l.* The respondent appealed to the Special Commissioners, who discharged the assessment.

Sir D. Hogg A.-G. and *R. P. Hills* for the Commissioners of Inland Revenue, appellants. The distribution of the new shares or of the nominal value thereof made by the company among its members was a distribution not of capital but of income, and the respondent in respect of the proportion of the distribution which fell to him is liable to super tax. The new shares represented accumulated profits of the company's trade which were clearly income. It is true that the company passed resolutions that it was desirable to capitalize these profits, and that they should be available for distribution as capital, but it is immaterial that the company resolve to capitalize their profits if in fact they are not truly doing so: per Pollock M.R. in *Inland Revenue Commissioners* v. *Fisher's Executors*. (2) The test whether in such a case as this the

(1) [1921] 2 A. C. 171.

(2) [1925] 1 K. B. 451, 459; now affirmed in H. L. [1926] A. C. 395.

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distribution of shares is a distribution of capital or of income is whether or not the shareholder is given a real option to take either shares or money, so that he has a right to be paid money, and if he accepts shares instead of money his acceptance of them is voluntary and not compulsory: see *Inland Revenue Commissioners* v. *Blott* (1) and *Inland Revenue Commissioners* v. *Fisher's Executors.* (2) In the present case the respondent was given a real option to receive either shares or money. The true view of the transaction is that the respondent received the whole of his bonus dividend in money and afterwards voluntarily spent part of the money in buying new shares in the company. This case is distinguishable in its facts from *Inland Revenue Commissioners* v. *Blott* (1), in which there was a distribution of shares, but no real option to the shareholders to receive either shares or cash. This case resembles the cases of *Pool* v. *Guardian Investment Trust Co.* (3), and *Inland Revenue Commissioners* v. *Doncaster* (4), in which it was held that the distribution by a company among its shareholders of shares representing accumulated profits was a distribution not of capital but of profits or gains, and consequently that the shares which fell to a shareholder were liable to income tax.

Latter K.C. and *Cyril King* for the respondent. The distribution by the company of the new shares or their nominal value was a distribution of capital and not of income, and the respondent is not liable to super tax in respect of the shares or money in lieu thereof received by him. When a company having surplus profits makes a distribution of them directly or indirectly among its shareholders, it depends, for all purposes, upon the intention of the company whether that which the shareholders receive is capital or income: see per Lord Haldane in *Inland Revenue Commissioners* v. *Blott* (5); per Atkin and Sargant L.JJ. in *Inland Revenue Commissioners* v. *Burrell* (6); per Warrington L.J. in *Inland*

(1) [1921] 2 A. C. 171.
(2) [1925] 1 K. B. 451, 459; now affirmed in H. L. [1926] A. C. 395.
(3) [1922] 1 K. B. 347.
(4) (1924) 40 Times L. R. 433.
(5) [1921] 2 A. C. 171, 180.
(6) [1924] 2 K. B. 52, 68, 72.

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Revenue Commissioners v. *Fisher's Executors* (1); and see also *Bouch* v. *Sproule* (2); *In re Evans* (3); and *Gunnis's Trustees* v. *Gunnis*. (4) The accumulated profits of a company may be income of the company on which it would be assessable to income tax, but, if the company distributes them in the form of either money or shares among its shareholders, they will not be income of the shareholders on which they are taxable, unless the company so intends: *Inland Revenue Commissioners* v. *Burrell*. (5) In the present case the intention of the company is to be gathered from the first circular letter addressed in August, 1919, by the directors to the shareholders, the resolutions passed at the extraordinary general meeting of the company on August 27, 1919, and the second circular letter dated August 28, 1919. It appears from these letters and resolutions that the company applied its surplus profits to making an increase of its capital by a creation of new shares, that it made a distribution of these shares or their nominal value among the shareholders, and that it never made any declaration of dividend among the shareholders. In these circumstances the plain presumption is that the intention of the company was to make a distribution of capital among the shareholders, and not a distribution of income. The burden is on the appellants of showing that the intention was to make a distribution of income, and they have not discharged that burden. The question whether the bonus received by the shareholders was capital or income is one of mixed law and fact. In so far as the question is one of fact all the evidence points to a capitalization scheme under which there was a distribution of capital. At all events it cannot be said that there was not evidence on which the Special Commissioners could find as a fact that the new shares or their value received by the respondent were capital and not income.

Sir D. Hogg A.-G. in reply. When a company makes a distribution of its profits among its shareholders the test

(1) [1925] 1 K. B. 451, 465; now affirmed in H. L. [1926] A. C. 395.
(2) 12 App. Cas. 385.
(3) [1913] 1 Ch. 23.
(4) (1903) 6 F. 104
(5) [1924] 2 K. B. 52, 68, 72.

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whether the amount which a shareholder gets is capital or income is the form in which it is given to him. If the amount is offered to the shareholder in the form of new shares or debentures only, then it is capital; but if it is offered to him with an option to take it either in cash or, if he prefers it, in new shares or debentures, then it is income. "An actual cash dividend, with a real option to the stockholder either to keep the money for his own use or to re-invest it in new shares, would be as far removed as possible from a true stock dividend . . . . where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal": per Pitney J. in *Eisner* v. *Macomber*. (1) In the present case the company had power under its articles of association to make a distribution of its profits either as income or as capital, and it adopted the former and not the latter course. The true view of the transaction is not that the company converted its surplus profits into share capital, sold the shares as capital to the shareholders and bought back such of them as the shareholders did not want to retain. The shares were never in fact issued or paid up, so that there could not have been an actual sale or purchase of them. The company could not lawfully have trafficked in its own shares even if it had desired to do so. The true view is that the company converted the accumulated profits into shares, and offered the shares to the shareholders with an effective option either to retain them or to take cash instead of them. The cases of *Bouch* v. *Sproule* (2) and *In re Evans* (3) are distinguishable, because in these cases the question was whether the proportion of the surplus profits falling to the shareholder was capital or income as between tenant for life and remainderman, and the test for determining the question in such a case as that is not the same as in a case between the Crown and the subject.

ROWLATT J. In this case the company in which the respondent had shares was at any rate in 1918 in so flourishing

(1) (1920) 252 U.S. 189, 215. (2) 12 App. Cas. 385. (3) [1913] 1 Ch. 23.

a condition that it had a sum of 90,000*l.*, representing part of the undivided profits, standing to the credit of its reserve fund. It dealt with that 90,000*l.* in this way. The capital was increased by 90,000*l.* The existing shares were altered to the denomination of 1*l.* shares, and then 90,000 more 1*l.* shares were created. The 90,000*l.* was applied in payment up of the new shares, and these were offered to the shareholder, who could either accept the shares or cash for the amount of them. The arrangements were carried out by resolutions passed at an extraordinary general meeting of the company. The first of these was as follows: "That it is desirable to capitalize the sum of 90,000*l.*, being part of the undivided profits of the company standing to the credit of the reserve fund of the company; and that the directors be authorized to withdraw such sum from the reserve fund accordingly, so that the same may be available for distribution among the shareholders as capital free of income tax." The company thus declared that it was desirable to capitalize that sum. The resolutions then provided, to put it shortly, that that sum should be applied in payment up to 90,000*l.* new ordinary 1*l.* shares, and that these new ordinary shares should be offered to the shareholders at par against the 90,000*l.* I will not read the other resolutions, because I want to direct attention more particularly to the circular letter which was sent out in pursuance of the resolutions to each shareholder. That circular begins with what it describes as the "offer," that being the heading of a paragraph which states that "the directors now offer to you of such new ordinary shares of 1*l.* each (fully paid) as capital," an amount of these shares in proportion to the shareholder's existing shares. The next paragraph is headed "option," and in it the shareholder is told that he may accept, either for himself or for his nominee, the new ordinary shares offered in whole or part, and then, if he accepts the offer, he simply takes the shares fully paid. Then it is stated that if the offer of the new shares is not accepted before September 12, 1919, it is deemed to be declined, in which case cash will be paid instead of shares, and at the end there is a paragraph headed "refusal."

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Rowlatt J.

Under these provisions it seems to me that the shareholder here had a real option to take the money. The circular containing the offer of the new shares and the option to take them or cash is sent to him, and if he does not accept the shares in twelve days he is to get the money. About one-ninth, roughly speaking, of the new shares that were available were not accepted, and that amount was paid in cash, some of it to the present respondent, and, in so far as the new shares were not accepted, they remained unissued, and no one else was invited to subscribe for them. In these circumstances, there being that real and free option to the shareholder, it seems to me that it is impossible for me to say that in this case the result is the same as in *Inland Revenue Commissioners* v. *Blott.* (1) As I read the judgments of the majority of their Lordships in that case, certainly those of Lord Haldane and Lord Finlay, and as I read the exposition of those judgments in *Inland Revenue Commissioners* v. *Fisher's Executors* (2) by the Lords Justices in the Court of Appeal, it seems to me that the very kernel of the decision there was that the shareholder had no option, that he simply was given shares and nothing more. In *Bouch* v. *Sproule* (3) the option which there existed was treated as being formal only, and not intended or expected to be acted upon. I do not think it is possible to say that of the option here in question, in view of the terms of the resolutions and of the circular letter and of the other events which have happened.

It is said, however, by Mr. Latter, and very attractively said, that the company is dominant, and that it can capitalize its reserves. So it no doubt can; but the question is has it done so? It can capitalize its reserves by actually capitalizing them, but not, as I understand it, by merely using a word in a resolution and saying that it is going to capitalize them. I do not think a company can capitalize its reserves by saying that it is capitalizing them and then dealing with them as if it is not capitalizing them. It seems to me that there is no doctrine under which that could be done. Now, to take

(1) [1921] 2 A. C. 171.
(2) [1925] 1 K. B. 451; now affirmed in H. L. [1926] A. C. 395.
(3) 12 App. Cas. 385.

the present case, what happened with regard to the cash that was dealt with? It originally formed part of the reserve fund of the company. Resolutions were passed that it was to be capitalized and withdrawn from the reserve fund, so that it might be available for distribution among the shareholders free of income tax. The company simply take the cash out of the reserve fund and pay it to the shareholders. How can it be said that by doing so they are capitalizing the money? The capital is not increased. When the fund has gone to the shareholders there is no increase of capital in respect of it. I do not see how it can possibly be said that there is. The suggestion that there is can only be made on the strength of the circumstance that the company have used the word "capitalize," and I cannot believe that the mere use of that word can have such an effect.

The shares that were accepted seem to me to stand on the same footing. The company, it is true, is dominant. It may apply money from its reserve fund to the purchase of shares if it desires to do so. It seems to me, however, that here the company has not applied the money to that purpose, but has given it to the shareholders.

I think I am bound by the decisions to allow these two appeals, but, even if I am not entirely bound, still in my judgment these appeals must be allowed with costs.

Appeals allowed.

Solicitor for appellants: *The Solicitor of Inland Revenue.*

Solicitors for respondent: *Johnson & Weatherall, for Parker, Rhodes & Co., Rotherham.*

J. R.

C. C. A.
1926
March 22.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* PERCY INGRAM DENYER.

Criminal Law—Uttering Letter demanding Money with Menaces—Menace—Reasonable or probable Cause—Honest Belief—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 29, *sub-s.* 1 (*i.*).

An Association, formed to watch over and protect the interests of manufacturers, wholesale retailers and users of motor goods, had by its by-laws power to place upon a stop list published by the Association the name of any person who was proved to its satisfaction to have offered, advertised or sold any motor vehicle or motor goods at a price above or below the manufacturers' fixed price lists, and no member of the Association was allowed to supply any motor goods to any person whose name was on the stop list. The Association usually offered any person who had offended as an alternative to inclusion in the stop list an opportunity to give an undertaking not to offend again and to pay a sum of money to the Association. The appellant was the servant of the Association and superintendent of its stop list. R., who was the proprietor of a garage but not a member of the Association, and who had sold a tyre and offered to sell a motor car at a certain price, appeared before the Association on a charge of selling motor goods below list prices. The appellant in the performance of his duty as the superintendent of the Association's stop list wrote to R. on January 14, 1926, that at a meeting of the Association it was resolved "that you be offered an alternative of inclusion in the stop list of payment of 250*l.* to the Indemnity Fund of this Association and publication of the enclosed form of undertaking in Motor Commerce. Please therefore let me have two cheques, one for 250*l.* made payable to this Association, and one for 7*l.* made payable to Motor Commerce, together with the enclosed form of undertaking duly signed on or before Monday next, 18th inst., otherwise I shall have no option but to include your name in the stop list, which must be in the printer's hands by that date." R. did not sign the undertaking or pay the money demanded, and his name accordingly appeared in the stop list published in the issue of Motor Commerce of January 23. The appellant was charged under s. 29, sub-s. 1, of the Larceny Act, 1916, of uttering a letter knowing the contents thereof, demanding money with menaces without reasonable or probable cause, and convicted. On appeal:—

Held, that the offence under s. 29, sub-s. 1, of the Larceny Act, 1916, is complete if a person utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without reasonable or probable cause, any property or valuable thing, and that it is not necessary to prove felonious intent, it being sufficient if the evidence establishes an intention on the part of the person accused to do the act forbidden by the statute; that an accusation, although true, may come within the definition of "menaces" in sub-s. 4 of s. 29, and that there was evidence for the consideration of the jury of the absence of

reasonable or probable cause, and that therefore the conviction must be affirmed.

By the Court: It did not follow that if the Association had the right to put the name of a person upon the stop list it had also the right to demand money from him as the price of not doing so.

APPEAL from a conviction.

The appellant, Percy Ingram Denyer, was convicted at the Exeter Assizes, under s. 29, sub-s. 1, of the Larceny Act, 1916, of uttering a letter demanding money with menaces. He was sentenced to six days' imprisonment and ordered to pay the costs of the prosecution.

The appellant was a servant of the Motor Trade Association, and in December of 1925 was appointed to be the superintendent of the Association's stop list. That Association was a trade union within the meaning of the Trade Union Act, and its objects were, amongst other things, to protect the motor industry, and generally to watch over and protect the interests of manufacturers, wholesale retailers, and users of motor goods. Under its by-laws, on proof to the satisfaction of the council of the Association that any person had offered, advertised, or sold any motor vehicle or motor goods at a price above or below the fixed list prices, the council could place the name of that person upon a stop list which the Association published; and no member of the Association was allowed to supply any motor goods to, or to have any trade relations with, any person whose name was on the stop list.

Mr. Read was the proprietor of Read's Garage at Honiton, and sold motor cars and accessories, but was not a member of the Motor Trade Association. On September 12, 1925, the appellant called at Mr. Read's garage and said that he was staying at Paignton and had just come from abroad, and was going to buy a house and wanted a car, and he asked Mr. Read to quote a price for a car. On the same day Mr. Read sold the appellant a tyre for the sum of 4*l*. On October 15, in consequence of a letter received from the appellant, Mr. Read met the appellant at the motor show at Olympia and there offered to sell a car at a price which he named. In November Mr. Read received two letters from the secretary of the Motor Trade Association,

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and as a result he appeared before the full council of the Motor Trade Association on November 12 by way of appeal from a decision of the stop list committee. The appellant was present at that meeting of the council. Mr. Read cross-examined the witnesses, and gave evidence both as to the offer of the car and as to the sale of the tyre. The matter was adjourned until January 14, 1926, and then Mr. Read again appeared, the appellant being also present. On January 15 Mr. Read received a letter which was written by the appellant as the superintendent of the Association's stop list, and which was the subject matter of the indictment in this case. The letter was as follows :—

"Motor Trade Association,
157 Great Portland St.,
London.
14th Jan., 1926.

Dear Sirs,

With reference to your appearance before the council of this Association this afternoon, I beg to inform you that it was resolved that you be offered an alternative to inclusion in the stop list of payment of 250*l.* to the Indemnity Fund of this Association and publication of the enclosed form of undertaking in Motor Commerce. Please therefore let me have two cheques, one for 250*l.* made payable to this Association, and one for 7*l.* made payable to Motor Commerce, together with the enclosed form of undertaking duly signed on or before Monday next, 18th inst., otherwise I shall have no option but to include your name in the stop list, which must be in the printer's hands by that date.

Yours faithfully,
For the Motor Trade Association,
P. Ingram Denyer,
Stop List Superintendent.

To Messrs. Read's Garage, Honiton."

Mr. Read did not sign the undertaking or pay the money demanded, but he took the letter as soon as he received it to the police.

In the issue of Motor Commerce of January 23, 1926, the name of Read's Garage, Honiton, appeared in the stop list. The effect, according to Mr. Read's evidence, was to paralyse the whole of his business; he could not buy a motor car or even a can of petrol.

J. A. Hawke K.C., *Sir Travers Humphreys* and *Harold Murphy* for the appellant. There was no evidence to go to the jury that the appellant committed an offence under s. 29, sub-s. 1, of the Larceny Act, 1916. The Motor Trade Association by its by-laws has the right to put persons, who sell motor goods above or below the fixed trade prices, upon its stop list, and members of the Association are required not to deal with such persons, but the Association gives such persons the alternative of making a payment to the indemnity fund of the Association and giving an undertaking not to offend again. It was the duty of the appellant as the superintendent of the Association's stop list to write to Mr. Read giving him that alternative to being placed on the stop list. The appellant, in writing the letter of January 14, did nothing beyond carrying out the orders of the Association and had no felonious intent.

[AVORY J. The motive in writing the letter is immaterial. The offence under s. 29, sub-s. 1, of the Larceny Act, 1916 (1), is uttering a letter knowing the contents thereof, demanding money with menaces, without any reasonable or probable cause.]

That section is intended to apply to cases where the intention is to extort money, but it does not apply where the object of the letter is not to injure but to enforce the protection of lawful trade interests. In order that something may amount

(1) Larceny Act, 1916, s. 29, sub-s. 1: "Every person who—

(i.) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing;

. . . . . .

shall be guilty of felony, and on conviction thereof liable to penal servitude for life. . . . ."

Sub-s. 4: "For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person."

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to a threat or menace there must be an intention to injure. An intention to protect a trade interest is not an intention to injure even although the effect of the act so done is to injure another. The absence of reasonable and probable cause for the demand for money cannot be proved by showing that there is no legal claim for the money demanded. When a person has a lawful right to do an act for the protection of his own trade interest he is not using menaces if he demands money as an alternative to doing such act. A menace implies an improper motive—namely, an intention to extort money. *Ware and De Freville, Ld.* v. *Motor Trade Association* (1) was in its facts identical with the present case. In that case there was a letter written by the defendants to the plaintiffs offering as an alternative to inclusion in the stop list the payment of a sum of money. The Court of Appeal held that the publication of the plaintiff's name in the stop list was done by the defendants bona fide in protection of trade interests of members of the Association, and therefore was not unlawful. That decision was approved and followed by the House of Lords in *Sorrell* v. *Smith*. (2) Rowlatt J. in *Ware and De Freville* (1) took the view that demanding money as an alternative to inclusion in the stop list was demanding money with menaces, but in the Court of Appeal Scrutton L.J. said (3) with reference to this : " If the stop list was justified, this means of avoiding it was in the plaintiffs' favour; if it is not justified, the alternative way of avoiding it does not seem to make it any worse. It is the commonest transaction to say in a libel action : 'I will not issue a writ or ask for damages if you will apologise and pay my costs,' but I never heard it called 'demanding money with menaces' before." Scrutton L.J. laid it down that it is not unlawful to take steps to protect the trade interests of those combining even although the natural consequences of those acts may be to injure another in his business. Atkin L.J. in the same case referred to the Larceny Act, 1916, as containing provisions whereby the obtaining or demanding money or other advantages

(1) [1921] 3 K. B. 40. (2) [1925] A. C. 700.
(3) [1921] 3 K. B. 64.

by menaces is made a criminal offence, and continued (1): "but the menaces are defined as being threats to accuse of particular crimes, or to publish defamatory matter, and the like. These are the only instances I know of threats held by the law to be definitely unlawful." The judgment of Atkin L.J. was accepted by Lord Buckmaster in *Sorrell* v. *Smith* (2) as being a clear and authoritative statement of the law.

[LORD HEWART C.J. In s. 29, sub-s. 4, of the Larceny Act, 1916, the term "menaces" is said to include an accusation, and therefore an accusation even though it were true might come within that term.]

There cannot be a menace within the section unless there is an intention to extort money. If the act which is proposed to be done is lawful as being in the protection of a trade interest the offer as an alternative of the payment of money does not turn it into a demand of money by menaces. Further, there was no direction by the judge as to what constitutes reasonable or probable cause, the absence of which forms one of the ingredients of the offence.

[AVORY J. It is for the jury to say whether there is reasonable or probable cause for making the demand: *Rex* v. *Dymond*. (3)]

Before a crime can be committed there must at least be the intention to do something wrong. It is a principle of our law that "Actus non facit reum nisi mens sit rea." The intent and act must both concur to constitute the crime: *Reg.* v. *Tolson*. (4) There is nothing in this statute to show that even if all the ingredients mentioned in s. 29, sub-s. 1 are present that the offence is committed unless there is a criminal intent. This conviction, therefore, ought not to stand.

Holman Gregory K.C. and *J. G. Trapnell* for the prosecution. The Motor Trade Association admittedly has the right to put the name of a man who has infringed its rules upon its stop list, but it has no right to demand money from him with menaces as an alternative to the inclusion of his name in the stop list. There is no nexus between the two acts. Sect. 29,

(1) [1921] 3 K. B. 83.
(2) [1925] A. C. 747.
(3) [1920] 2 K. B. 260, 265.
(4) (1889) 23 Q. B. D. 168, 171, 193.

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sub-s. 1, of the Larceny Act, 1916, is absolute and clear in its terms, sub-ss. 2 and 3 deal with the intent to extort, but those words are not in sub-s. 1. Neither Scrutton L.J. nor Atkin L.J. when giving his judgment in *Ware and De Freville* v. *Motor Trade Association* (1) was dealing with the question of the commission of a crime.

[They were stopped.]

Sir Travers Humphreys replied.

The judgment of the Court (LORD HEWART C.J., AVORY and FINLAY JJ.) was delivered by

LORD HEWART C.J. The appellant was convicted at Exeter Assizes of feloniously uttering a letter demanding money with menaces. He was sentenced to six days' imprisonment and was ordered to pay the costs of the prosecution. The sentence was a merely nominal sentence, regard being had to the date upon which the Assizes had begun.

The first count of the indictment was under s. 29, sub-s. 1, para. (1.), of the Larceny Act, 1916. It charged that the appellant on January 15, 1926, at Honiton, did utter, knowing the contents thereof, a letter or writing demanding certain property—namely, a cheque for 250*l.*, and another cheque for 7*l.*—from a Mr. Read with menaces and without any reasonable or probable cause. There were two other counts in the indictment, but the learned judge ruled that there was no case to go to the jury on those counts and a verdict of acquittal was entered upon them. In the result the appellant was convicted on the first count, and he now appeals on the ground that on the facts which were proved no offence under s. 29 of the Larceny Act was disclosed. [His Lordship having stated the facts set out above continued :] The letter of January 14 is upon its face the clearest possible demand for two cheques for 250*l.* and 7*l.* respectively, and it says that unless the payments are made on or before January 18, that is, three days after the receipt of the letter, there is "no option but to include your name in the stop list, which must be in the printer's hands by that date."

(1) [1921] 3 K. B. 40.

Two propositions have been urged on behalf of the appellant: first, that there was no evidence to go to the jury, and secondly, that the summing up of the learned judge was incorrect and inadequate. It is important to see what are the words of this section. Sect. 29 of the Larceny Act, 1916, deals with many different matters, and it provides that many different acts, if they are committed, shall cause the person who commits them to be guilty of a felony. The first of those acts is as follows: "Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing . . . . shall be guilty of felony."

It is abundantly clear that the appellant uttered this letter, that he knew its contents, and that it demanded 257*l*. But it is said that "there is no evidence of menaces, and no evidence of the absence of any reasonable or probable cause. It is further suggested that on the true construction of this section it is not enough that these four named ingredients should be present: what is required also is that that which is done should be done feloniously.

To deal first with the second point. In the opinion of the Court this section describes what the felony is, and if the named ingredients are proved to be present, it follows that a felony has been committed. If a person utters, knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause any property or valuable thing, it follows that that which has been done is a felony. It is no answer for a man to say: "I knew what is alleged, and I did what is alleged, but nevertheless I had no felonious intent."

Reference has been made to *Reg.* v. *Tolson*. (1) With regard to that case, it is important to bear in mind the observations made upon it in *Rex* v. *Thomas Wheat* and *Marion Stocks* (2) in this Court. The judgment of the Court contained this passage: "It is true that the judgment in *Reg.* v. *Tolson* (1), though influenced to a great extent by that proviso,

(1) 23 Q. B. D. 168. (2) [1921] 2 K. B. 119, 126.

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proceeded mainly on the application of the maxim, 'Actus non facit reum, nisi mens sit rea'—a maxim admitted to be uncertain and often misleading in its application, but it was limited in that case to the belief in the death of the former husband, and the case now in question of a belief in a divorce having been obtained was not discussed or considered. In our opinion the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the person accused to do the act forbidden by the statute, namely, 'being married, to marry another person during the life of the former wife or husband': see the judgment of Bramwell B. in *Reg.* v. *Prince* (1) as to the application of this maxim, and *Bank of New South Wales* v. *Piper*." (2)

It is said, however, in the present case that, at any rate, there was no evidence of menaces. Now the word "menaces" is dealt with in another sub-section of s. 29. By sub-s. 4 it is provided as follows: "For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person." In order that an accusation may come within that definition, it is not necessary that the accusation should be untrue. An accusation, though true, perfectly fulfils the definition. What is said in this letter, and said in the most unequivocal language, is, that unless these considerable sums of money are paid before a certain date, then not far distant, there will be an accusation printed in this widely circulated trade journal.

It is also said that there was no evidence of the absence of reasonable or probable cause, and for that purpose no little stress was apparently laid or sought to be laid upon the case of *Ware and De Freville, Ld.* v. *Motor Trade Association*. (3) There are at least two observations to be made with reference to that case. In the first place, it raised no such question as that which is involved in the present discussion. In that case, as was said in the clearest terms by Atkin L.J. (4): "The plaintiffs do not allege that they have

(1) (1875) L. R. 2 C. C. 154, 175.
(2) [1897] A. C. 383, 390.
(3) [1921] 3 K. B. 40.
(4) Ibid. 76.

in fact suffered damage, and the relief they ask is confined to an injunction against publishing their name in a stop list calculated either to injure them in their business, or to prevent any persons dealing with them, or to induce any persons to break their contracts with them." It is quite true that when one looks—and this is the second observation—at certain pages of this report, there are incidental references to the alternative proposal or demand for the payment of money. Such was the reference in the judgment of Scrutton L.J. (1) But it is to be observed that those remarks were essentially of the nature ot obiter dicta, and the analogy of a libel action which the learned Lord Justice selects (1) is one in which, ex hypothesi, the person making the claim has a money claim sounding in damages. Atkin L.J., upon whose judgment apparently considerable stress was laid, does not expressly refer to the alternative money claim, but he does refer (2) to some of the provisions of the statute with which this Court is at this moment concerned, the Larceny Act, 1916. But inadvertently, if I may say so with great respect, the learned Lord Justice says that "the menaces are defined" (in this statute) "as being threats to accuse of particular crimes, or to publish defamatory matter, and the like." One is bound to say when one looks at the terms of the statute, that the offence, by s. 29, sub-s. 1, is complete if a person utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without reasonable or probable cause, any property or valuable thing. It is quite true that the remaining parts of the section go on to more precise matters, and to the allegation of a precise intent. But those observations do not apply to the opening words of this designedly comprehensive section.

Upon the question what is meant by "reasonable and probable cause," it may be well to recall the words that were used in this Court in the year 1920 in *Rex* v. *Dymond* (3), where Lord Reading C.J. said: "In our judgment the question must be determined solely by reference to the language of the statute. The words are 'without any reasonable or

(1) [1923] 3 K. B. 40. (2) Ibid. 83. (3) [1920] 2 K. B. 260, 265.

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probable cause' and nothing in the original statute or in the consolidating statute suggests that an honest belief by the accused in a reasonable or probable cause for the demand would negative the crime. In order to constitute the offence it must be proved that the accused: (1.) uttered the writing; (2.) demanded property or a valuable thing with menaces; (3.) knew the contents of the writing; and (4.) had no reasonable or probable cause for making the demand. It is for the jury to decide whether there was reasonable or probable cause for making the demand and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it. The belief of the accused may, of course, be taken into consideration by the judge in passing sentence, but in our view it is not material in ascertaining whether the crime has been committed."

In the opinion of this Court there was not merely some, but ample and overwhelming material for the consideration of the jury in this case. It has been said again and again, that because this Trade Protection Association had the legal right to put the name of Mr. Read upon the stop list, it therefore had a legal right to demand money from him as the price of abstaining from putting his name upon the stop list. In the opinion of the Court, that proposition is not merely untrue; it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers to an indefinite extent. There is not the remotest nexus or relationship between a right to put the name of Mr. Read upon the stop list, and a right to demand from him 257*l.* as the price of abstaining from that course.

Finally it is said that, even though the Court should hold —as we do hold without the slightest hesitation—that there was ample evidence here to go to the jury, nevertheless the learned judge did not adequately or correctly sum up the case to the jury. Upon investigation that criticism comes to this, that the learned judge, it is said, omitted adequately to direct the jury upon the question of the absence of reasonable and probable cause. It is not necessary to reread the whole or many parts of this summing up, but at p. 73 of the transcript

one finds these words: "The next question is whether it is without reasonable or probable cause. Reasonable or probable cause does not mean reasonable or probable cause for putting him on the stop list. You must assume on the one side the Association say that this gentleman so broke their regulations that they had to put him on the stop list, and that they had a right to do so, and on the other side it is said 'No. You have to decide whether they have reasonable and probable cause for demanding money.' The question you have to decide is whether they had reasonable or probable cause for demanding the money. A person has no right to demand money, according to the Act of Parliament, as a price of abstaining from inflicting unpleasant consequences upon a man. If you think that this money was demanded by threat, and that there was no reasonable or probable cause for demanding the money, then the offence is complete." It is urged on behalf of the appellant that the learned judge ought to have dwelt more in detail upon the meaning of those words "reasonable or probable cause" in this particular context. If he had done so, it is apparent that any observations he would have made would have had the tendency and the effect of limiting and circumscribing the generality of the excuse which he left to the jury. If he had been more precise, if he had condescended more to particulars, the effect must have been less and not more favourable to the accused. Looking at this summing up as a whole, and reading one part of it with another, we are of opinion that it is not open to the criticisms which have been sought to be passed upon it.

In these circumstances and for these reasons we are satisfied that there was ample evidence to go to the jury, that this summing up is free from the defects imputed to it, and that there is no reason whatever for interfering with the conclusion to which the jury came, and therefore this appeal is dismissed.

Appeal dismissed.

Solicitors for appellant: *Engall & Crane.*

Solicitor for prosecution: *Director of Public Prosecutions.*

R. F. S.

1926
April 13.

WATSON AND ANOTHER *v.* CULLY.

Licensing—Club—Club Premises—Association of Members—Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), s. 4.

By s. 4 of the Licensing Act, 1921, subject to certain provisions of the Act, "No person shall, except during the permitted hours—(*a*) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed either on or off the premises":—

Held, that the word "club," as used in the section, means the premises of a registered club, and not the association of persons who are members of the club.

Where, on the occasion of a fête, a registered club engaged a room adjoining the ground on which the fête was to be held, and there supplied intoxicants to members otherwise than in the permitted hours:—

Held, that as the room in question was not habitually used for the purposes of the club, no offence had been committed under s. 4 (*a*).

CASE stated by justices of Norfolk.

An information was preferred by the respondent against Archie Edward Watson and William Baker Malin, the appellants, for that they on August 3, 1925, at the parish of Hockwold-cum-Wilton, in the county of Norfolk, unlawfully did, otherwise than during the permitted hours, to wit, at 4.25 P.M., by their servant Harry Joshua Richardson, supply to certain persons named Thomas Brown, John Sharman, William Willett, Charles Edward Carpenter, Thomas William Shinn, and Albert Carpenter, in a registered club called the Hockwold Village Club, certain intoxicating liquor, to wit, beer.

The Hockwold Village Club, a society registered under the Friendly Societies Act, 1896, occupied premises known as the Hockwold Village Club in the street at Hockwold, and was duly registered in accordance with the provisions of ss. 91 and 92 of the Licensing (Consolidation) Act, 1910. The appellant Watson was the chairman of the committee of management, the appellant Malin was the secretary, and Harry Joshua Richardson was a steward employed by the club. By a rule of the club made in pursuance of s. 1, sub-s. 2, of the Licensing Act, 1921, the hours for the sale

of intoxicants in the registered premises of the club on weekdays were from 11 A.M. to 2 P.M. and from 5 P.M. to 10 P.M. On the occasion of a fête at Hockwold Hall, held on August 3, 1925, the Hockwold Village Club, acting by its committee of management, purchased a special stock of refreshments for the use of its members at the fête. Such refreshments were delivered by the persons from whom the same were purchased at a room adjoining and having an entrance from the ground on which the fete was held, and were there supplied to members during the time the fête was in progress. The room was engaged for that purpose only, the club having never occupied it at any other time before or since. It was situated about half a mile from the registered premises of the club, which were closed on that day. The committee being advised that they would not be acting in contravention of the Licensing Act, 1921, directed the steward to supply members with intoxicants in the room at any hour during the day. At about 4.25 P.M. the steward supplied beer to the men above named. As regards William Willett, the beer was supplied on the order of Thomas William Shinn, a member of the club, and, as regards Albert Carpenter, on the order of Charles Edward Carpenter, a member. The others were members.

The justices were of opinion that a club did not cease to be a registered club on removal to temporary premises; that the restrictions on the hours of sale were applicable to the club in temporary premises; and that such premises were the premises of the club. They held that an offence had been committed under s. 4 of the Licensing Act, 1921, and convicted the appellants.

The question for the opinion of the Court was whether the justices came to a correct determination.

A. H. Forbes for the appellants.

S. G. Turner for the respondent.

LORD HEWART C.J. In this case the short point is what is the meaning of the word "club" in s. 4 of the

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Lord Hewart C.J.

Licensing Act, 1921. Sect. 20 provides that "For the purposes of this Act—The expression 'club' means registered club." [His Lordship read s. 4 (*a*) and continued:] No doubt there are places in this Act, as in the Act of 1910, where the word "club" is used as indicating an association of persons. But the question is, what is the meaning of the term in this particular section? In my opinion, in view of the context, the expression means the premises of a registered club. In the finding of the justices the word is used in two senses. They say that in their opinion a club does not cease to be a registered club on removal to temporary premises. There the word is used in the sense of an association of persons. But if the word is used in this section in the sense of the club premises, one cannot speak of the club being removed to temporary premises. I think that the justices were wrong in the construction they put upon the word. The conviction must be quashed and this appeal must be allowed.

AVORY J. I am of the same opinion. If the practice which was adopted in this case were generally followed, it might lead to proceedings being taken under s. 95 of the Licensing (Consolidation) Act, 1910, against a club which behaved in that way on the ground that it was not being conducted in good faith as a club, but I can see no answer to the argument that s. 4 (*a*) contemplates the actual physical premises. The words "in any licensed premises or club" can only relate to the club premises. The conviction must be quashed and the appeal allowed.

SHEARMAN J. I am of the same opinion. It was decided in *Humphrey* v. *Tudgay* (1) that when members of a registered club take intoxicants of their own at a certain price, that does not constitute a "sale" of liquor. I think it is clear that s. 4 of the Licensing Act, 1921, must mean "in any licensed premises or club premises." What are club premises is defined in s. 91 of the Licensing (Consolidation)

(1) [1915] 1 K. B. 119.

Act, 1910. "The secretary of every club which occupies a house or part of a house which is habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, or any other premises which are habitually so used, and in which any intoxicating liquor is so supplied, shall cause the club to be registered in manner provided by this Act." No association of persons calling itself a club is touched by the Licensing Acts unless it has premises habitually used for the purposes of a club in which intoxicating liquor is supplied to members or their guests. This room was not habitually so used, and the summons should therefore have been dismissed.

Appeal allowed.

Solicitors for appellants: *McBride & Co., for W. R. Greenland, Thetford.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for H. C. Davies, Norwich.*

F. C.

[IN THE COURT OF APPEAL.]

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1926
April 13.

GODMAN *v.* TIMES PUBLISHING COMPANY, LIMITED.

[1952. G. 733.]

Practice—Particulars—Libel—Justification—Allegation of Conspiracy to defraud—Specific Charge—Particulars of other fraudulent Acts.

The plaintiff complained of a libel charging him with conspiring with specified persons to defraud the underwriters of a certain ship and her cargo by pretending that the ship had been attacked and the cargo seized by pirates. The defendants pleaded that the words complained of were true in substance and fact. In their particulars of justification they stated facts concerning cargoes, greatly over insured by or with the knowledge of the plaintiff, on two other vessels, and alleged that part of the cargo on one of them had been transferred to a motor boat and seized by foreign revenue authorities, the vessel's log having been altered so as to make it appear that the cargo was covered by the insurance when in fact it was not; and that the other vessel was scuttled, and half her cargo lost, her policy having been indorsed with a false warranty of her class. The plaintiff applied to have these allegations struck out of the particulars on the ground that they were irrelevant.

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The defendants' case being that the subject-matter of the libel was a part only of a wide scheme for defrauding underwriters :—

The Court refused to strike out the allegations at that stage in the proceedings, but left for future consideration by the appropriate tribunal the questions (1.) of the defendants' right to discovery in respect of the facts alleged, and (2.) of the admissibility of those facts in evidence at the trial.

APPEAL from an order of Fraser J. in chambers affirming an order of Master Chitty striking out certain particulars of the defendants' plea of justification to an action of libel.

The statement of claim was substantially as follows :—

1. The plaintiff, a retired Lieutenant-Commander of the Royal Naval Reserve, was at all material times the owner of the motor schooner *Veronica*. The defendants are the proprietors, printers, and publishers of the Times newspaper.

2. In June, 1924, a firm known as J. D. Bode G.m.b.H. & Co. of Bremen, Germany (hereinafter called "J. Bode & Co."), became the charterers of the *Veronica* at a lump sum freight. On July 19, 1924, the schooner sailed from Bremen with a cargo of wines and spirits belonging to the charterers.

3. On October 24, 1924, the schooner, while lying at anchor about twenty miles south of Montauk Point, Long Island, was attacked by armed pirates who carried off the cargo or the greater part thereof.

4. On February 25, 1925, the defendants falsely and maliciously printed and published in their newspaper of and concerning the plaintiff and of and concerning him as a shipowner the words following : "Two seamen named Macmillan and Hansen, who are accused of having been concerned in an unusual smuggling adventure, were arrested by the Hamburg police yesterday. Their arrest has directed attention to the enormous liquor smuggling trade that goes on from the ports of Bremen and Hamburg.

"According to the Hamburg newspapers, the police allege that a man named Thomas Godman, in business in Bremen, chartered in July, 1924, a British motor vessel, the *Veronica*,

and loaded her with 18,770 cases of spirits, valued at 680,000 dollars (136,000*l.*)—equivalent to about 12*s.* a bottle—for shipment to a rendezvous off Long Island, outside the 12 mile limit, where they were to be sold to American spirit runners. It is alleged that he insured the ship and cargo with a South-German insurance company, and then shipped a crew of Germans in Bremerhaven for a voyage, as the men were told, to Morocco, while he himself travelled to America by passenger steamer, and there got into touch with another business man named Helmuth Hartmann for the purpose of effecting the sale.

"On October 12, the police allege, the *Veronica* lay at anchor off Long Island outside the 12 mile limit. A motor-boat came alongside, and a man who represented himself as the representative of Godman came aboard. The allegation is that he suddenly blew a whistle, whereupon his own crew of 12 men rushed the *Veronica's* crew with revolvers, bound them and shut them in the fo'c'sle; the cargo was then gradually transferred to an American sailing vessel, *Ellys B.*, a task that occupied some three weeks, during the whole of which the *Veronica's* crew were kept prisoner; the pirates then damaged the *Veronica's* engines and compass and made off. The vessel ultimately reached a British port. It is alleged that Godman had arranged the attack for the purpose of swindling the insurance company, and that Hartmann was the leader of the pirate gang which carried off the *Veronica's* cargo. Neither has yet been arrested.

"The published accounts of the incidents leave their accuracy on several matters open to doubt." . . . .

[The rest of the article contained comments on the part played by North German seaports as depots for the spirit smuggling trade.]

5. By these words the defendants meant and were intended and understood to mean that the plaintiff had wickedly and fraudulently entered into a conspiracy with other persons mentioned in the libel to defraud the underwriters by arranging a pretended piracy of the cargo, and that in

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pursuance of this conspiracy a pretended piracy took place, and that the cargo in the *Veronica* was seized and removed by or on behalf of the plaintiff himself, and that the plaintiff had thereby been guilty of criminal and fraudulent conduct.

The defendants admitted that they were the proprietors, printers and publishers of the Times, but denied the other allegations relating to the plaintiff in para. 1 of the statement of claim. They admitted that the *Veronica* sailed from Bremen on July 19, 1924, with a cargo of wines and spirits, but denied the other allegations in para. 2. They denied all the allegations in para. 3. They denied that they published the words complained of falsely or maliciously or of or concerning the plaintiff as a shipowner. They did not deny the innuendo. They pleaded that the words were true in substance and in fact. With their pleading they delivered lengthy particulars of justification, including in substance the following :—

1. The plaintiff since the year 1923 has been associated with the German firm of J. Bode & Co. carrying on business at Bremen in the shipment of spirits and liquor from Europe to the Atlantic Ocean and elsewhere for sale in the United States. It was verbally agreed between this firm, whose partners included one Werner Lerbs and one Willi Lerbs, that the plaintiff should handle the business of the firm in liquor and spirits in the rum carrying or rum running trade. In February, 1924, the plaintiff purchased two small schooners afterwards called the *Tom August* and the *Kathleen Annie*. In March, 1924, the plaintiff formed a company called Schooners Associated, Ld., to which the two schooners were transferred. The plaintiff had a controlling interest in the company. The schooners were employed in the rum carrying trade. In April, 1924, the plaintiff purchased another schooner called the *Veronica*. She was registered as owned by Schooners Associated, Ld. Part of the purchase money for the *Veronica* was provided by J. Bode & Co. The liquor carried in the rum carrying trade by the schooners consisted in part of liquor of an inferior quality—namely, whisky

known as Perfection whisky, manufactured in J. Bode & Co.'s factory at Bremen.

2. In April, 1924, the plaintiff as manager of Schooners Associated, Ld., owners of the *Tom August*, chartered that schooner to the Trans-Ocean Company of Bremen, in which the said Werner Lerbs had a controlling interest, for a voyage to Halifax via Bermuda with a cargo of 16,048 cases of liquor, including 10,632 cases of Perfection whisky. The cargo, which was not of a greater value than $203,568, was insured for $325,000 or thereabouts, the leading underwriters being the Assecuranz Union of 1865. The cargo was insured, as the plaintiff well knew, upon the condition, among others, that the underwriters should not be liable for seizure within twenty nautical miles of the North American coast. On or about August 16, 1924, at a point about twenty nautical miles from Block Island 510 cases of this whisky were transshipped from the *Tom August* into a motor boat, the *Jenny T.* An explosion occurred on board the *Jenny T.*, and the *Tom August* took her in tow and shaped a course for Montauk Point. When the vessels were about fourteen nautical miles from Montauk Point, within the twenty mile limit, the plaintiff being at the time on board the *Tom August*, an American revenue cutter, the *Seneca*, seized the *Jenny T.*, together with her cargo of 510 cases of whisky. The plaintiff afterwards, with intent to defraud and procure false evidence for the purpose of making a claim against the Assecuranz Union, induced the master of the *Tom August* to enter in her log the statement, false to the knowledge of the plaintiff, that the *Jenny T.* and the *Tom August* were twenty-four nautical miles from Montauk Point when the *Seneca* seized the *Jenny T.* and the whisky on board of her. Thereby it was made to appear that the seizure had taken place outside the twenty mile limit, and in a position where it was a risk covered by the insurance, whereas in truth, as the plaintiff knew, the seizure took place within the twenty mile limit, and so was not covered by the insurance.

3. On or about September 14, 1924, the plaintiff, as manager of Schooners Associated, Ld., owners of the *Kathleen Annie*,

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chartered that schooner to J. Bode & Co. for a voyage from Bremen to St. Pierre, Newfoundland, with a cargo of spirits shipped by the said J. Bode & Co. to their order. It was verbally agreed between them and the plaintiff that the proceeds of the sale of the cargo should after payment of expenses be divided equally between J. Bode & Co. and the plaintiff. Alternatively half the cargo belonged to the plaintiff. The cargo consisted of 17,000 cases of Perfection whisky, which, as the parties well knew, was not easily saleable in the United States. The cargo was over insured. It was of the value of $42,500 or thereabouts or alternatively, including profit cost and freight, of $110,000 or thereabouts. It was insured by the plaintiff or J. Bode & Co. with the plaintiff's knowledge with the Frankfurter Allgemeine Versicherungs A.-G. for $330,000, i.e., at the rate of $19.41 per case. The schooner was insured for $20,000, the Intag Phöbus being the leading underwriters, by a policy transferred from the *Tom August* by an indorsement appearing on the policy, in which indorsement it was warranted by the plaintiff, or by J. Bode & Co. with the plaintiff's knowledge, that the *Kathleen Annie* was classed A1 at Lloyd's. In fact she was a wooden motor sailer of 262 tons net register classed by the Bureau Veritas as first class for coastal navigation. In furtherance of a conspiracy between the plaintiff and J. Bode & Co. she was thrown away at Greenholm on or about September 29, 1924, and became a total loss. Half of the cargo or thereabouts was also lost. A claim was made on behalf of the plaintiff with his knowledge against the insurance company for $174,690 or thereabouts in respect of the cargo so lost.

The rest of the particulars related exclusively to the adventures of the *Veronica* and her cargo, and were not objected to.

The plaintiff applied by summons that so much of the particulars as related to ships other than the *Veronica* should be struck out on the ground that they tended to prejudice embarrass and delay the fair trial of the action and that they were irrelevant and unnecessary and contrary to the

rules of pleading. Master Chitty ordered that the paragraphs of the particulars numbered 1 to 3 inclusive should be struck out. On appeal Fraser J. affirmed the Master's order.

The defendants appealed.

Eustace Hills K.C. and *Wilfred Lewis* for the appellants. The Master and the learned judge were wrong in striking out the particulars relating to the *Tom August* and the *Kathleen Annie*. The case for the appellants is that the fraud committed by means of the *Veronica* was only part of a much larger conspiracy to defraud underwriters, and that the transactions with the other two vessels, the over-insurance and the tampering with the log of the first, and the false warranty of the class and the scuttling of the second, were overt acts of the same conspiracy. It would be unfair to the appellants to strike out these particulars at this stage, for without stating them they will not be allowed to give evidence of the facts and matters on which they rely in support of their plea of justification: *Zierenberg* v. *Labouchere* (1); and they will not be able to get discovery relating to them: *Yorkshire Provident Life Assurance Co.* v. *Gilbert* (2); *Arnold & Butler* v. *Bottomley*. (3)

[*Makin* v. *Attorney-General for New South Wales* (4); *Rex* v. *Ball* (5); and *Rex* v. *Smith* (6) were also referred to.]

J. D. Cassels K.C. and *Morle* for the respondent. The only libel published and complained of relates to a particular conspiracy and a particular shipment. That is the only libel justified; yet the appellants seek to include in their particulars facts and matters which would possibly justify two other libels, if they had been published, but which do not touch or concern the libel complained of. "The particulars must be relevant to the matter in hand" and "material to the issue": *Wernher, Beit & Co.* v. *Markham* (7), per Collins M.R. The facts and matters alleged in these particulars are not relevant or material to the respondent's

(1) [1893] 2 Q. B. 183.
(2) [1895] 2 Q. B. 148.
(3) [1908] 2 K. B. 151.
(4) [1894] A. C. 57.
(5) [1911] A. C. 47.
(6) (1915) 11 Cr. App. R. 229.
(7) (1901) 18 Times L. R. 143, 146.

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conduct with regard to the *Veronica*; at the highest they would hardly afford circumstantial evidence of the libel complained of. But particulars ought not to include evidence: Rules of the Supreme Court, Order XIX., r. 4. [*Clarkson* v. *Lawson* (1) and *Reg.* v. *Geering* (2) were also cited.]

Eustace Hills K.C. in reply.

BANKES L.J. The question in this case arises upon a special branch of practice—namely, that relating to particulars of the plea of justification in an action of libel. If a defendant in such an action pleads justification he must give, whether voluntarily or under compulsion of an order, particulars of the facts and matters relied on in support of the plea, and until sufficient particulars of the plea are given the issues in the action are not defined. The respondent, the plaintiff in this action, complains of a paragraph in the Times newspaper which had reference only to his conduct in relation to a cargo of spirits on board the schooner *Veronica*. He said that this paragraph was a libel upon him, and he set out in his statement of claim the whole paragraph complained of, and added the innuendo that the words meant and were intended and understood to mean that the plaintiff had wickedly and fraudulently entered into a conspiracy with other persons mentioned in the libel to defraud underwriters by arranging a pretended piracy of the cargo, and that in pursuance of this conspiracy a pretended piracy took place; and by his innuendo he confined the meaning of the words quite properly to a conspiracy among particular persons in relation to a particular cargo. The appellants, having admitted both the publication and the innuendo, in their particulars of justification set out a number of facts and matters relating to vessels other than the *Veronica*, proposing to show that the respondent's dealings with the *Veronica* and her cargo were dishonest and were the outcome of a conspiracy which involved not only the persons mentioned in the libel but other persons as well, and the object of which

(1) (1830) 6 Bing. 587. (2) (1849) 18 L. J. (M. C.) 215.

was to defraud underwriters. As proof of the respondent's dishonesty and of the conspiracy in pursuance of which he acted, they rely upon fraudulent transactions in relation to two other vessels, the *Tom August* and the *Kathleen Annie* and their cargoes, by which in other ways the conspirators sought to defraud underwriters.

The respondent took out a summons before the Master to strike out so much of the particulars as referred to the cargoes in the vessels other than the *Veronica* on the ground that any evidence in relation to those two cargoes was irrelevant and inadmissible in this action; among other arguments he contended that by admitting the innuendo, which was confined to a conspiracy among particular persons with regard to a particular cargo, the appellants have shut themselves out from relying on any other matters. In my opinion that argument is not sound. The mere admission of publication and of the accuracy of the innuendo does not necessarily preclude a defendant from going into other facts and matters on which he relies in support of his plea of justification. As the present practice stands a defendant is placed in a difficult position. The facts and matters on which he relies in support of his plea are taken to define the extent of his obligation to give particulars. Naturally therefore he includes in his particulars all the facts and matters on which he intends to rely. Of course, if he were to include anything that was obviously irrelevant, the plaintiff would be right in taking the earliest opportunity of striking that out. But sometimes a defendant seeks to rely on facts and matters which may or may not be admissible as evidence in chief in support of his plea of justification, and the future relevancy of which is a matter of doubt at the time when they are stated as particulars. And this, as it seems to me, is one of those cases. If at the trial the defendant seeks to give evidence of a fact which the judge thinks ought to be stated, but which is not stated, in the particulars, the defendant runs a serious risk of having his case only partly heard. Moreover it has been held in two cases, *Yorkshire Provident Life Assurance*

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Co. v. *Gilbert* (1) and *Arnold & Butler* v. *Bottomley* (2), that it is useless for a defendant to apply for discovery in relation to facts and matters which ought to be, but are not, included in the particulars. In many cases it is difficult to draw a line between the facts and matters themselves which must be stated, and evidence of those facts and matters, which should not be stated; but in the present case I think that, if the appellants intend to rely on the facts and matters relating to the *Tom August* and the *Kathleen Annie* and their cargoes, those facts and matters ought to be stated in the particulars. Whether they are to be admitted in evidence or not is a matter to be decided by the judge at the trial when the question comes up for decision; it can hardly be decided by a Master or a judge in chambers on an application to strike out particulars.

What should be stated in the particulars of justification has been considered more than once. I should like to refer to *Wernher, Beit & Co.* v. *Markham* (3), where Collins M.R. said; "In the first place, the particulars must be relevant to the matter in hand. In the next place, in dealing with a matter like this, where the defendant justified, he was bound, both upon authority and upon clear principles of common sense and justice, to support his justification by facts distinctly stated and material to the issue." . . . . Of course the issue is defined by the particulars, and those words of the Master of the Rolls indicate that the defendant must take a wide view of his obligation to give particulars in the interest of the plaintiff, who has a right to know the case to be made against him. To the same effect is the language of Kennedy L.J. in *Wootton* v. *Sievier* (4): "The degree of fulness and precision which ought to be required in an action for libel from a defendant, who has pleaded a justification and has been ordered to give particulars under that plea, is not infrequently a matter which admits of reasonable debate. Certain general propositions are now, I think, not

(1) [1895] 2 Q. B. 148.
(2) [1908] 2 K. B. 151.
(3) 18 Times L. R. 143, 146; affirmed in the House of Lords, ibid. 763.
(4) [1913] 3 K. B. 499, 503.

open to controversy. In every case in which the defence raises an imputation of misconduct against him, a plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation." Those words certainly do not restrict the effect of the order for particulars, which directs that the facts and matters relied on in support of the plea must be stated. Unless a defendant is given a reasonable opportunity of stating his case he may be unduly prejudiced at a later stage. He cannot have discovery in relation to matters which he has not stated. On the other hand the latitude allowed to the defendant is an advantage to the plaintiff in that it shows him the case he has to meet, and it does not really prejudice him at any later stage because, although the defendant may apply for discovery concerning facts and matters disclosed in his particulars, it does not necessarily follow that discovery will be ordered. It lies in the discretion of the Court whether it will in the circumstances order discovery at all, or at what stage it will make an order, postponing the order, if it thinks fit, until a certain foundation has been laid for granting it. For these reasons I am of opinion that it would be an injustice to the appellants if they were at this stage to be shut out from alleging in the particulars of their plea of justification the facts and matters contained in the paragraphs which have been struck out by the learned Master and the learned judge. The appeal must therefore be allowed.

SCRUTTON L.J. I agree. The appellants have published an article referring to the smuggling of spirits into countries where the importation of spirits is prohibited, and alleging that the respondent shipped some spirits to the United States, which is one of those countries. It is alleged that he insured the schooner *Veronica* and her cargo of spirits with a South German insurance company; that the schooner was boarded and her cargo was seized by men armed with revolvers; and that the respondent had arranged the

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attack in order to swindle the insurance company. That seems to be a definite charge of attempting to swindle the insurance company in connection with the shipment on the *Veronica*. When the respondent brought the action for libel, the appellants justified and gave particulars of their justification which, besides a number of allegations concerning the *Veronica*, contain statements that the respondent was also interested in a schooner, the *Tom August* and her cargo, part of which was seized by a Revenue cutter; that the respondent had insured the cargo against seizures more than twenty miles from the coast of the United States, that he knew she was seized within twenty miles of the United States, but that he was a party to making a fraudulent entry in the schooner's log that she was seized more than twenty miles from the United States, in order to recover from the insurance company. These particulars also state that the respondent was interested in a steamer called the *Kathleen Annie*, which also went with spirits to the United States; that he caused her to be scuttled and made a claim on the underwriters having been party to a warranty concerning her class which he knew to be untrue. I am not going to decide whether evidence about the *Tom August* and the *Kathleen Annie* will be admissible at the trial of this action. It is enough to say that in view of *Makin* v. *Attorney-General for New South Wales* (1) and *Rex* v. *Smith* (2) it is arguable that the evidence is admissible. The question is whether these statements should be included in the particulars of justification. From one point of view it is an advantage to the respondent that they should appear in the particulars, because he might find himself at a loss if they were sprung upon him at the trial before his legal advisers were prepared to meet them. It may be that technically they are not particulars of justification of this libel, but they are statements of facts on which the appellants propose to rely to prove that the respondent attempted to defraud the underwriters of the *Veronica*; and so they fall within the words of Kennedy L.J. in *Wootton* v. *Sievier* (3):

(1) [1894] A.C. 57. (2) 11 Cr. App. R. 229. (3) [1913] 3 K.B. 499, 503.

"A plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation." A difficult question may arise if an application for discovery is made hereafter; due weight will then no doubt be given to the language of the Court of Criminal Appeal in *Rex* v. *Smith* (1), that evidence of other similar acts does not become admissible until a prima facie case has been established, assuming that those words are held to be applicable.

In these circumstances it is fairer to the respondent that these matters should remain in the particulars of justification. I appreciate the difficulty of drawing the line between a statement of a fact and a statement of the evidence by which the fact is proved; but if the appellants had confined themselves to saying: "We propose to prove that you attempted to defraud the underwriters of the *Veronica* by proving, among other things, that you made the like attempt on the underwriters of the *Tom August* and of the *Kathleen Annie*," I think the respondent would have lost no time before applying for particulars of the facts on which they relied in support of those allegations. Now he has got those particulars. The questions of discovery and of the admissibility of the facts as evidence at the trial must be decided by the appropriate tribunals.

ATKIN L.J. I agree. This case raises an important question—namely, whether certain matters ought to be inserted in particulars of justification. It is to be remembered that neither in an action of libel nor in any other action is a defendant obliged to plead matters of evidence; on the contrary Order XIX., r. 4, provides that "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved." . . . . It is suggested that a practice has grown up of requiring evidence to be stated in particulars of justification and of ruling out at the

(1) 11 Cr. App. R. 229.

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trial evidence of facts which have not been included in the particulars. If there is such a practice it should be discontinued; it seems to me to be wrong. A defendant would be put at a great disadvantage if he were precluded from giving evidence of facts which he had properly stated in his plea of justification. If an allegation were made in a general form that a person stole, it would be enough for the defendant to say in his particulars of justification that the plaintiff stole from A. B. on a particular date from a particular house, or stole from the person, giving particulars of what was stolen. It would be unnecessary and improper to give in his particulars circumstantial facts leading to the inference that a larceny had been committed—for instance, that the plaintiff was upon the premises at or about the time, that he was seen to depart hurriedly after the crime had been committed, and that he was afterwards seen to sell the object stolen or try to dispose of it at a price much below its value. Those might all be acts committed by the plaintiff in the supposed action, but they are not within the rule laid down by Kennedy L.J. in *Wootton* v. *Sievier*. (1) In addition to the words already cited I should like to read one or two passages from that judgment. After saying that the plaintiff ought to be entitled to go to trial with knowledge not merely of the general case for the defence but of the acts which he is alleged to have committed and upon which the defendant intends to rely, the Lord Justice goes on to say (2): "This rule of justice is not limited in its application to actions of libel, although, of course, it includes them (see per Kay L.J., *Zierenberg* v. *Labouchere* (3)), and its propriety is most evident in a libel case where the defendant has chosen to put the character of the plaintiff in serious jeopardy by the heinousness of the charges which are asserted or involved in the defendant's plea of justification. In such a case, at all events, the pronouncement of Alderson B. in *Hickinbotham* v. *Leach* (4), approved of and explained in reference to the modern system of pleading by Lord Esher M.R.

(1) [1913] 3 K. B. 499.
(2) [1913] 3 K. B. 503.
(3) [1893] 2 Q. B. 183, 190.
(4) (1842) 10 M. & W. 361, 363.

in *Zierenberg* v. *Labouchere* (1), is not one whit too strong: 'The plea ought to state the charge with the same precision as in an indictment.'" Then further on comes this passage (2): "The Court, before acceding to it"—an application by the plaintiff for particulars—"must be careful to see that the demand is not of a vexatious or oppressive character, or, the material facts being pleaded by the defendant in the statement of defence, or stated in particulars, if such have been delivered by him, with sufficient precision to enable the plaintiff to know and to prepare himself to deal with them, that the plaintiff is not covertly endeavouring to get something more to which he is not entitled, namely, the disclosure of the evidence to prove those facts which may be in the defendant's possession." Therefore at the highest Kennedy L.J. required that particulars of justification should be such as to support a criminal indictment. Applying that to this particular charge, I find that the charge is one of conspiracy with certain persons who can be named and identified with reference to the voyage of the particular schooner *Veronica*; it is in these words: "That the plaintiff had wickedly and fraudulently entered into a conspiracy with the other persons mentioned in the libel to defraud the underwriters by arranging a pretended piracy of the cargo." If that were made the subject of a criminal charge it would import a conspiracy to defraud the underwriters of the *Veronica* and her cargo by means of the false pretence that there had been a loss by piracy when there had in fact been no such loss. The overt acts would be acts of the plaintiff and those persons. Acts in relation to another vessel and conspiracy with other persons would be unnecessary matter in the indictment and might even vitiate it. Whether they would be admissible in evidence is quite another question. Facts may be given in evidence which need not be set out in an indictment. For example, on a charge of obtaining money by false pretences similar acts about the same time having some connection between them and indicating a fraudulent scheme or system of

(1) [1893] 2 Q. B. 183, 186, 187. (2) [1913] 3 K. B. 504.

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obtaining money from the prosecutor and others, though they would find no place in the indictment, may yet be given in evidence. But they are evidence, not particulars. I do not wish to say one way or the other whether the facts alleged in this case about the other two vessels are admissible to prove the intent to defraud alleged in the plea of justification; I am inclined to agree with the learned Master and the learned judge that these facts are not the proper matter of a plea of justification; but, as no harm is done to the respondent by leaving them in, subject to the question of discovery, which I will refer to next, I do not dissent from the views of my brothers, that on the whole it is better that the facts should remain among the particulars.

With regard to discovery, I think it is likely that these facts were given a place among the particulars of justification in order that the appellants might obtain discovery; and that the respondent wished to have them struck out so as to avoid giving discovery. The relevance of the facts depends upon some prima facie connection being established between them and the fraud alleged in the adventure of the *Veronica*, and it is not likely that until some proof has been given of that alleged fraud, the Court will allow discovery of matters which otherwise would be extraneous to the action. For these reasons, and inasmuch as the order is without prejudice to the questions of discovery and admissibility of evidence and the respondent is thereby given notice of facts which the appellants intend to rely on, I am not prepared to dissent from the decision that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Soames, Edwards & Jones.*
Solicitors for respondent: *Buckeridge & Braune.*

W. H. G,

[IN THE COURT OF APPEAL.]

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1926
March 23;
April 26.

BETTS *v.* CLARE AND HEYWORTH, AND CLARE AND HEYWORTH, LIMITED.

Revenue—Income Tax—Trade Profits—Trade set up within three Years preceding Year of Assessment—Average of Profits—Computation—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II. r.* 1, *sub-r.* 2; *r.* 9.

On March 1, 1919, a firm set up a new trade. On December 31, 1919, they made up the first account of the trade for the ten months from March 1, 1919, to December 31, 1919, that account showing a profit for that period of 1000*l.* The firm sold the trade as from January 1, 1920, to a company consisting of the same persons. The company made up an account of the profits of the trade for the three months from January 1, 1920, to March 31, 1920, showing a profit for these three months of over 12,000*l.* The firm had duly paid income tax on the profits of their trade for the year ending April 5, 1919. For that year the assessment to income tax under the Income Tax Act, 1918, Sch. D, was made on the firm in a sum equal to a proportionate part (from March 1 to April 5, 1919) of the profits shown by the account to December 31, 1919, and it was agreed that this was correct. For the year ending April 5, 1920, an assessment was made on the firm and the company in certain sums. The firm and the company appealed to the Special Commissioners on the ground that this assessment ought to have been made on a smaller sum representing twelve-tenths of the profits shown on the first account only for the period of ten months, the sum being apportioned between the firm and the company according to their respective liabilities. It was contended on behalf of the Crown that the assessment should be made on a sum representing twelve-thirteenths of the profits shown by combining the two accounts for the respective periods of ten months and three months, that sum being apportioned between the firm and the company according to their respective liabilities. The Commissioners allowed the appeal, and their decision was affirmed by Rowlatt J. On appeal:—

Held (by Lord Hanworth M.R. and Sargant L.J.; Scrutton L.J. dissenting), that on the true construction of Sch. D, Cases I. and II., r. 1, sub-r. 2, the average was to be estimated for a period beginning with the setting up of the trade on March 1, 1919, and ending on March 31, 1920, and that the contention of the Crown was therefore right.

Glensloy Steamship Co. v. *Lethem* (1914) 6 Tax Cas. 453 and *Burntisland Shipbuilding Co.* v. *Weldhen* (1923) 8 Tax Cas. 409 not followed.

Decision of Rowlatt J. [1925] 2 K. B. 402 reversed.

APPEAL from a decision of Rowlatt J. (1) on a case stated by Commissioners for the Special Purposes of the Income Tax Acts.

(1) [1925] 2 K. B. 402.

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BETTS v. CLARE AND HEYWORTH.

On March 1, 1919, Arthur Clare and Herbert Heyworth, then trading as Clare & Heyworth (hereinafter called "the respondent firm"), commenced a new business as textile manufacturers. On December 31, 1919, they made up the first account of their business for the period of ten months from March 1, 1919, to December 31, 1919, anticipating that the excess profits duty would be terminated on the latter date, and that an accurate account for the period ending on that date would be required for the purposes of that tax. The profits for that period of ten months amounted, according to that account, the accuracy of which was not disputed, to 1000*l.* On February 12, 1920, the respondent firm entered into an agreement for the sale of the goodwill and assets of their business as from January 1, 1920, to Clare & Heyworth, Ld. (hereinafter called "the respondent company"), which was incorporated on February 16, 1920, and adopted the agreement on March 1, 1920, the members of the respondent firm being the sole shareholders of the respondent company. The respondent company had since carried on the business. It decided to make up its accounts annually to March 31 in each year, and it accordingly made up an account for the period of three months from January 1, 1920, to March 31, 1920. That period was one of great prosperity in the textile industry, and the profits of the business for these three months amounted to 12,150*l.*, as was not disputed. The respondent company had since made up its accounts for each year to March 31. It was admitted that apart from considerations of excess profits duty the first account would in all probability have been made up for the period of thirteen months from March 1, 1919, to March 31, 1920. On February 3, 1923, the respondent firm were assessed for the year 1918–19 to income tax in respect of profits of trade for the period March 1 to April 5, 1919, in the sum of 117*l.*, being a due proportion of the profit of 1000*l.* shown by the first account for the period of ten months ending December 31, 1919, and it was not disputed that this assessment was correct.

On April 3, 1922, an assessment to income tax was made upon the respondent firm in the sum of 6250*l.*, and on

February 14, 1923, an additional assessment was made upon the respondent firm in the sum of 4358*l.*, and on April 3, 1922, an assessment to income tax was made on the respondent company in the sum of 6250*l.*, all the said assessments being made for the year ending April 5, 1920, in respect of profits of trade, and all being made by the Additional Commissioners of Income Tax for the East Morley Division of the West Riding of Yorkshire.

On February 11, 1924, the respondent firm and the respondent company appealed against the said assessments to the Special Commissioners.

It was contended on behalf of the respondent firm and the respondent company (1.) that the assessment to income tax for the year ending April 5, 1920, ought to be made on the sum of 1200*l.*, being twelve-tenths of the profit of 1000*l.* shown by the first account for the period of ten months ending December 31, 1919, and apportioned between the firm and the company under the Income Tax Act, 1918, Sch. D, Rules applicable to Cases I. and II., r. 9; (2.) that under r. 1, sub-r. 2, of these Rules (1) the computation for the

(1) The Income Tax Act, 1918, Sch. D, provides:—

1. Tax under this Schedule shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing . . . . :

(ii.) to any person residing in the United Kingdom from any trade, profession, employment or vocation. . . . .

2. Tax under this Schedule shall be charged under the following cases respectively; that is to say,—

Case I.—Tax in respect of any trade not contained in any other Schedule;

Case II.—Tax in respect of any profession, employment, or vocation not contained in any other Schedule; . . . .

. . . . and subject to and in accordance with the rules applicable to the said Cases respectively.

RULES APPLICABLE TO SCHEDULE D.

Rule Applicable to Case I.

The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Schedule A, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment.

Rules Applicable to Cases I. and II.

1.—(1.) The tax shall be charged without any other deduction than is by this Act allowed.

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year 1919–20 (the second year of assessment) should be made on the average of the profits from the date of the first setting up of the trade—namely, March 1, 1919; (3.) that the profits arising in the year of assessment were incapable of being made the subject of the retrospective method of computation applicable to profits of trade under the relevant provisions of the Act, and that the method of assessment adopted in this case involved a departure from that method which was not warranted; (4.) that the proper method of assessment was to expand the profits for the ten months to December 31, 1919, to terms of one year; (5.) that the fact that the making of assessments was delayed, or that assessments were not made until after preparation of an account of profits arising in the year of assessment did not justify the bringing into computation of those profits for assessment under Sch. D. Case I. (1); and (6.) that the assessments appealed against should be reduced to 1200*l.*

It was contended on behalf of the Crown that the assessment for the year ending April 5, 1920, ought to be made in the sum of 12,138*l.*, being twelve-thirteenths of the profits of 13,150*l.*, arrived at by combining the two accounts for the periods of ten months from March 1 to December 31, 1919, and three months from January 1 to March 31, 1920. It was agreed that the assessment ought to be apportioned between the respondent firm and the respondent company.

The Commissioners allowed the claim that the liability to tax for the year ending April 5, 1920, should be based on the account for the ten months to December 31, 1919, without regard to the account for the three months to March 31, 1920, and they accordingly reduced the assessment to 1200*l.*

Rowlatt J. held, that on the true construction of Sch. D,

(2.) Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI.

(1) See note (1) ante, p. 291.

Cases I. and II., r. 1, sub-r. 2, the decision of the Commissioners was right.

The Crown appealed. The appeal was heard on March 23, 1926.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the Crown. The decision of Rowlatt J., affirming that of the Special Commissioners, was wrong, and proceeded upon an erroneous application to the facts of the Rules applicable to Sch. D of the Income Tax Act, 1918. By the Rule applicable to Case I., "The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . . and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment." That is the general rule, and applies only where the business has been carried on for a period of at least three years. By r. 1, sub-r. 2, of the Rules applicable to Cases I. and II.: "Where the trade . . . . has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI." In accordance with that sub-rule the computation of profits of the trade in the present case for the year ending April 5, 1920, must be made on the average of the profits for one year from the first setting up of the same, and the profits of the period from January 1, 1920, to March 31, 1920, must be taken into account for the purpose of arriving at that average. The profits of the preceding ten months from March 1 to December 31, 1919, cannot be used as the exclusive basis for arriving at the average, which under r. 1 above mentioned is the measure of chargeable profits.

There are no English authorities upon the point, but there

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are two Scotch cases: *Glensloy Steamship Co.* v. *Lethem* (1) and *Burntisland Shipbuilding Co.* v. *Weldhen* (2), which have an important bearing on the subject. Neither of those cases, however, decides the present point, but they both contain dicta for and against the Crown's contention. It is submitted that it was rightly decided in the *Glensloy* case (1) that the profits in the year of assessment may be taken into account. Rowlatt J. considered himself bound by the *Burntisland* case (2) to hold the contrary, but it is submitted that that case does not cover the present.

[SCRUTTON L.J. referred to *Ryhope Coal Co.* v. *Foyer* (3).]

Cyril King for the respondents. The point is one of pure construction of r. 1, sub-r. 2, of Rules applicable to Cases I. and II., as read with the General Rule of Sch. D. These rules must be read together.

The Income Tax Act, 1918, is a consolidating Act, and has not altered the law under the Income Tax Act, 1842, the relevant provisions of that Act being s. 100, Sch. D, Case I., r. 1. It is clear, it is submitted, from those provisions that the measure of liability to be applied is, on principle, retrospective. The year of assessment may not be encroached upon save in the one case where the principle of retrospective measure is inapplicable—namely, where the trade is set up within the year of assessment. In that case the profits of the year are both the measure and subject of charge.

The Act of 1918 is to the same effect, though the arrangement of its provisions is different. But mere pagination or rearrangement of the rules is irrelevant.

I rely upon the decision in the *Burntisland* case (2), which in no material fact differs from this case, and should be followed. The argument for which the respondents in this case contend is forcibly put by Lord Clyde and Lord Cullen in the *Burntisland* case. (2) The fact that in computing the profits for the year 1918–19 the following year was encroached upon by looking at the account to December, 1919, is no justification for an encroachment upon that year in

(1) 6 Tax Cas. 453. (2) 8 Tax Cas. 409.
(3) (1881) 7 Q. B. D. 485.

computing the profits assessable for that year. The account to December, 1919, was merely used as some evidence of profits in the absence of an account to April 5, 1919. The construction of the statute cannot depend upon the dates selected for the making up of the accounts.

Sir Douglas Hogg A.-G. replied.

Cur. adv. vult.

April 26. The following written judgments were delivered:—

LORD HANWORTH M.R. This is an appeal from a judgment of Rowlatt J. given on June 18, 1925, upon a case stated by the Commissioners for Special Purposes, whereby he confirmed the decision of the Commissioners. The facts must be shortly stated. On March 1, 1919, the respondent firm set up and commenced a new business as textile manufacturers. On December 31 in the same year they took stock, and made up the first account of their business for the period of ten months from March 1 to December 31, 1919. This was done for a special purpose, because it was anticipated that the excess profits duty would be terminated at the latter date, and that an accurate account for the period down to that date would be required in connection with that tax. For that period of ten months the profits of the business amounted to 1000*l.*

On February 12, 1920, an agreement was made between the respondent firm and the respondent company, and subsequently carried into effect, whereby the firm sold to the company its goodwill and assets, and the company has thereafter carried on the business of the firm. The members of the respondent firm were the sole shareholders in the respondent company. The company made up its accounts to March 31, 1920, and has continued in each subsequent year to treat that date as the close of its financial year. The three months from January 1 to March 31, 1920, proved to be a period of great prosperity, and the profits of the business for those three months reached the total of 12,150*l.* The case proceeds: "5. It was admitted that the respondent firm had from the first contemplated the formation of a

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limited company to take over the business, and that apart from considerations of excess profits duty, the first account of the business would in all probability have been made up for the period of thirteen months from March 1, 1919, to March 31, 1920. 6. The respondent firm was assessed on February 3, 1923, for the year 1918–19 to income tax in respect of profits of trade for the period March 1 to April 5, 1919, in the sum of 117*l.*, being a due proportion of the profit of 1000*l.* shown by the account for the period of ten months ending December 31, 1919. It was not disputed that this assessment was correct. 7. It was contended on behalf of the respondent firm and the respondent company that the assessment to income tax for the year ending April 5, 1920, ought to be made in the sum of 1200*l.*, being twelve-tenths of the profits of 1000*l.* shown by the first account for the period of ten months ending December 31, 1919, and apportioned between the respondent firm and the respondent company under r. 9 of the Rules applicable to Cases I. and II. of Sch. D."

No question arises as to the apportionment of the amount to be paid by the firm and the company respectively. The question which we have to determine is how ought the assessment for the year ending April 5, 1920, to be ascertained. Ought the period down to December 31, 1919, the date of the first account, only to be taken and expanded to twelve months by a simple arithmetical calculation, or ought the profits of the whole year to March 31, 1920, to be taken? The first of these methods excludes the large sum of 12,150*l.* from the assessment; the latter includes it. The Commissioners and Rowlatt J. decided in favour of the first method, and the Crown appeals. The Crown claims that the full period of business down to the close of the first period of thirteen months, on March 31, 1920, ought to be taken, and that twelve-thirteenths of the total, reached by adding the 1000*l.* for the first ten, to the 12,150*l.* for the last three months, making together 13,150*l.*—namely, 12,138*l.*—is the amount on which the respondents are to be assessed.

Income tax in the year ending 1920 was charged by s. 1

of the Income Tax Act, 1918, for there was in that year an Act (8 & 9 Geo. 5, c. 15) which, by s. 17, charged income tax at 6*s.* in the £.

Sect. 1 of the Act of 1918 is as follows: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those schedules." And by s. 2 every assessment and charge to tax is made for the year commencing April 6, 1919, and ending April 5, 1920. Sch. D is the schedule which comprises the profits or gains of the respondents, and the tax is to be charged in accordance with the rules applicable to that schedule. I have set out the original charging section, because it is important to remember that the schedule and the rules provide the machinery whereby the profits and gains that fall within the schedule are to be measured, the primary liability being enacted by s. 1.

Annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade not contained in any other schedule fall within Sch. D, and are charged to tax under Case I.

The Rules applicable to Sch. D now come into consideration. The relevant part of "the Rule applicable to Case I." is as follows: "The tax . . . . shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment."

It is thus that the three years' average referred to in the later rule is introduced, and the conclusion of those three years may fall either on the last day of the financial year of the business preceding the year of assessment, or on the last day of the income tax year under s. 2 of the Act of 1918.

The option thus given is determined, so we are told, by the acts of each case. If the accounts of the trade or business

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are made up to a particular date, that is taken; if not, the last day of the income tax year is used. In the present case the business was commenced but a few weeks before the year of assessment, and the three years' average does not apply. Thus, r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. applies, which is as follows: "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI." It may be added that by s. 207 the rules and directions contained in the Fifth Schedule are to be observed, "so far as the same are respectively applicable."

I have now referred to all the relevant parts of the Act—schedule, case, and rules. In no part of them can I find any authority for making the year of assessment, or the limit of time, at which the period from which the assessment is to be calculated, determine at December 31, 1919, the date which was adopted by the Commissioners and approved by Rowlatt J. That date was chosen for a particular purpose—namely, as the close of an accounting period under the Finance Act (No. 2), 1915, which imposed the excess profits duty. It was not the close of the financial year or half year of the business. I cannot find any justification for the selection and approval of that date.

Coming back then to the part of the rule relevant to such facts as are present here, where the business has been set up and commenced within three years preceding the year of assessment "the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same." The terminus a quo is expressly laid down, that is in the present case March 1, 1919. What is the terminus ad quem? The word "average" appears to indicate a period longer than that for which the assessment is to be made, for all cases have to be determined under this part of the rule in which the trade "has been set up and

commenced within the said period of three years "—that is the three years preceding the year of assessment—while it could only be shorter if the commencement of the business was just before the year of assessment began and the financial year of the business closed as a date earlier than twelve months from its commencement.

The words " profits or gains for one year " are, I think, substituted as a synonym for " annual profits or gains." The clause cannot mean that the period for computation is to be twelve months running from the first setting up of the business. Such an interpretation gives no effect to the word " average," and selects an arbitrary termination of the year, at a moment which may be neither coincident with a balance sheet, with the year of assessment, nor with any anniversary in the business. Such a capricious date is not consonant with the general system of the Act.

Inasmuch as the case supposed is that of a business which " has been set up and commenced within the said period of three years," and the terminus a quo starts from the period of the first setting up of the same, it seems not irrational to take the last date down to which figures for the average are to be taken, as the close of the financial year of the business or of the year of assessment, selected as above indicated—that is in the present case March 31, 1920.

If it is objected that this method may involve some estimate or prophecy as to what will be, or will have been, the profits and gains for a year not concluded at the date when the return for assessment purposes has to be made, it may be answered that in some cases where the three years' average system is not available, this very method is enjoined, as in the case of " profits of an uncertain value and of other income described in the rules applicable " to Case III. (see Finance Act, 1922, s. 17) and those falling under Case IV. When the computation thus formed on estimate or prophecy is not realized, under r. 8 of the same series of rules, on proof at the end of the year to the satisfaction of the Commissioners that the actual profits or gains fall short of the amount so computed, the trader is entitled to be charged on the actual

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amount instead of upon the amount so computed, and if there has been payment of the sum in excess of the adjusted figure, the trader is entitled to repayment of the amount overpaid.

It is further to be noticed that in cases which fall within the last clause of r. 1, sub-r. 2—that is those businesses which have been set up and commenced within the year of assessment and in respect of which the computation is to be made according to the Rules applicable to Case VI.—"the computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the Commissioners." There is thus power in them to require a period of such length as down to the end of the year of assessment may give a fair average—and an arbitrary shorter limit than the end of the year of assessment is not imposed. It is difficult to find reason why in the case of businesses commenced in the year of assessment the term for computation may be to the end of the year of assessment; whereas in the cases of businesses commenced before the year of assessment a shorter term is imposed. Rowlatt J. said that the question to be decided by him had been decided by the Scottish Courts, and he followed the decisions of the *Burntisland Shipbuilding Co.* v. *Weldhen* (1), explaining the *Glensloy* case. (2) Those cases are not binding upon this Court, but it is necessary to examine them.

I have great difficulty in following the reasoning of the majority of the Court in the *Glensloy* case. (2) It is more easy to accept the opinion of Lord Johnston, if it gave a period sufficiently long on which reasonably to base an average: but the uncertainty and danger of accepting his view is forcibly explained by the Lord President. (3) The *Glensloy* case (2) appears to me to be unusual upon its facts, and the opinions of the learned judges overlook the procedure under the Income Tax Act in other cases than the particular

(1) 8 Tax Cas. 409. (2) 6 Tax Cas. 453.
(3) 6 Tax Cas. 457, 462.

one before them. The effect of the judgment was to base the computation on a period down to a date when a balance sheet was in fact made up in the year of assessment, adjusting it to a period of twelve months. It is said that this balance sheet was only used as evidence; but its effect was such that it increased the computation of profits from 1762*l.* to 5274*l.*, and that by carrying on the period into the year of assessment.

The *Glensloy* case (1) was considered in the *Burntisland Shipbuilding Co.* v. *Weldhen.* (2) The ratio decidendi of that case is shortly put by Lord Cullen, who says (3): "I think the natural reading of the statutory enactment in question is that where the period of trading antecedent to the year of assessment is shorter than three complete years, the materials for computing the artificial amount of profit for the year of assessment consist of the results of the trading for such shorter antecedent period." The cases that fall within r. 1, sub-r. 2, are cases where no trading for three years antecedent to the year of assessment is available. It cannot be assumed that where a different rule has to be adopted, because the measure used in the other cases does not exist, that measure, pro tanto, is to be retained. The methods adopted for assessments under Cases III. and IV. in the year of assessment do not appear to have been considered. Bearing these in mind, and others to which I have referred, I cannot discover any "natural" reading of the statutory enactment unless, a priori, one deems that an average based upon an antecedent period of less than three years must have been intended. The safer course to my mind is to take the words of the rule as they are. They provide for cases different from those that fall under the rule applicable to Case I., and I see no inherent objection or impossibility in acceding to the argument which the Lord President (4) rejects as untenable—"to get 'an average for one year' by departing—ad hoc—from the retrospective ascertainment of trading profits, and by bringing into account profits which cannot be ascertained

(1) 6 Tax Cas. 453.
(2) 8 Tax Cas. 409.
(3) 8 Tax Cas. 420.
(4) Ibid. 418.

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until a future balance sheet is struck." The objection to the argument appears to be based upon an assumption as to the method intended apart from the actual words of the rule itself, which covers businesses which began before, and also in, the year of assessment.

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With great respect to the Court and the judges who decided it, the *Burntisland* case (1) was in my judgment wrongly decided, and I cannot follow it.

Having thus dealt with the cases which Rowlatt J. felt to be binding upon him, there is no other authority to be considered. In my judgment the right interpretation of this difficult rule is to hold that the average is to be ascertained from a period ending with the balance sheet in the year of assessment, that is, March 31, 1920. The appeal must be allowed with costs here and below; the case must be remitted to the Commissioners, and the assessment must be altered, so that if I understand the figures aright, the sum of 12,138*l.* will be substituted for that of 1200*l.*

SCRUTTON L.J. A trader might be assessed to income tax on the actual profits of the year of assessment; but this would involve waiting till the end of the year to ascertain the profits, and it is desired to collect the tax during the year; so a conventional rule has been enacted that the trader's profits for the year of assessment shall be computed on the average profits of the trading in the three years preceding the year of assessment or preceding the last day on which the accounts are usually made up preceding such year of assessment, with a power to the trader to diminish the assessment, if he can show loss from some specific cause during the year of assessment, but with no power to the Crown to increase the assessment if the profits of the year of assessment in fact exceed the conventional average.

Now suppose a three years' average is impossible. Suppose the business only begins during the year of assessment. In such a case the profits are by r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. to be computed under Case VI.; that case

(1) 8 Tax Cas. 409.

by r. 2 provides that the computation shall be made either on the actual profits of the year of assessment, or according to an average as directed by the Commissioners, who are given a very free hand to do what they think proper. The latter part of this rule appears not to apply to businesses set up within the year, for such a business has been carried on ex hypothesi for less than a year. There are, therefore, no materials for a period greater than a year from which an average can be taken; for before the business commences there are no profits to form the groundwork of an average, and the Attorney-General admits that profits after the year of assessment cannot be the subject of the average. You do not tax a man in the year 1925 because he has made profits in the year 1926.

There remains the present case, where the business was started before the year of assessment, but less than three complete years before the commencement of that year. The language of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D of the Act of 1918 on the point is: "The computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same." This replaces r. 1 of Case I. of Sch. D. of the Act of 1842, which used the words: "The computation shall be made for one year on the average of the balance of profits and gains from the period of the first setting up of the same." The words "for one year" have been shifted in position. Consideration of Sch. A, No. II., r. 8, and No. III., r. 9, and the rules just quoted, leads me to the opinion that the somewhat cryptic words quoted mean that the figure of one year's profits is to be derived from an average of, or estimated in proportion to, the profits of a period commencing when the business was first set up. The question still to be answered is when that period whose profits are to give an average is to end. And I have had considerable doubt whether we are not being asked rather to legislate to replace an omitted provision than to construe the words of the statute.

The subject contends that just as the three years' average

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terminates at the beginning of the year of assessment, so the year's profits, if there are not three preceding years, must still be based on a period terminating at the commencement of the year of assessment. I can see no particular reason why this should be so, except that if by calculation you are to estimate a figure on an average derived from a different period, one would rather assume that the period affecting the average would be one of facts and not of estimates. Clearly when the business is started within the year of assessment actual profits within the year are considered. But the difficulty of the Crown is to say exactly when the period from which the average is derived should end. Is it when the taxpayer makes his statement for assessment, when by Cases VII. and VIII. of Sch. V. he is to declare the amount of the profits and gains of the year of assessment "upon a fair and just average of the three preceding years, or of such shorter period as the trade or profession has been carried on"? This view has the advantage that he will get his average from a period of actual profits. Is it to be up to the time when the appropriate tribunal finally adjudicates, which may be after the year of assessment, or is it to be on the average of a period from the first setting up of the business to the end of the year of assessment, a period which will be partly arithmetical computation, and partly estimate, and which may exceed three years, the period for the normal average? This view makes the statement to be made by the taxpayer a very difficult one, an average based partly on fact, partly on estimate; and an estimate of future profits is not an easy task.

There is no English authority on the subject. The Scottish cases do not seem to be in unison. In the *Glensloy* case (1) the year of assessment was April 6, 1912, to April 5, 1913. The trading began in September, 1911; the first balance sheet was made up to November 20, 1912. The Crown assessed on the average of the period from September, 1911, to November, 1912. The company desired an assessment on an average of the profits made on the first two voyages, which

(1) 6 Tax Cas. 453.

however terminated after April, 1912. The majority of the Scottish Court held the Crown's contention right, Lord Johnston dissenting. In the *Burntisland* case (1) the year of assessment was April, 1919, to April, 1920. The business had started in May, 1918. The Crown assessed on an average based on the twenty-two months, May, 1918, to April, 1920, in two alternative ways. The taxpayer contended for a twelve months' assessment, based on an average derived from the profits of the ten months, May, 1918, to April, 1919. The Court held the company's contention right. The Lord President's judgment seems to lay stress on the company's balance sheet, rather than the balance sheet for the statutory period, whatever that might be: Lord Cullen's to take the view that as the three years' average is on a period ending before the year of assessment, any shorter period for average must end at the same time.

I have so far dealt with principle. What the parties are really fighting about is this. The year of assessment is April 5, 1919, to April 5, 1920. The business was started on March 1, 1919, and it is agreed up to December 31, 1919, made a profit of 1000*l*. It was turned into a company, and from January 1 to April 5, 1920, there was made a profit of 12,150*l*. Only one account had been made up before the end of the year of assessment—namely, in December, 1919—and that for the special purpose of excess profits duty. The firm and company desire to assess on an average derived from the month from March 1 to April 6, the profits for the month being themselves derived from an average derived from ten months up to December 31, when the first account was prepared. The Crown desire to get the twelve months' profit on an average derived from a period of thirteen months, March, 1919, to April, 1920, that is, from the setting up of the business to the end of the year of assessment.

The Commissioners have adopted the contention of the taxpayer, and Rowlatt J., following as I think the decision in the *Burntisland* case (1), has affirmed their decision. He attaches apparently considerable importance to the balance

(1) 8 Tax Cas. 409.

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sheet, which I do not understand. When a three years' average is possible it may either be of three years before the date to which the accounts are usually made up, preceding the year of assessment, or of three years up to the beginning of the year of assessment. In the present case, no balance sheet was made up before the year of assessment, and December 31 is not a usual date at all.

The statute clearly prescribes that these profits are to be taxed, and if no rule were provided, presumably the amount of the profits of the year, either actual or estimated, would be the figure on which the trader should pay. But the statute clearly gives the guidance that the year's profits are to be calculated on an average or by a rule of three sum, in which a period commencing before the year of assessment is a factor. If "x" represents the length of that period, the sum is: As "x" is to twelve months, so are the profits made during "x" to the profits to be taxed as representing those of the year of assessment.

The duty of the trader begins when he has received a notice from the assessors to make a declaration of his income within twenty-one days; he is then to declare the amount upon a fair and just average of the three preceding years or such shorter period as the trade has been carried on: Sch. V., Case VII. These words contemplate that the period cannot be longer than three years, as it would be if he had to deal with profits up to the end of the year of assessment and the trader had started more than two years before the year of assessment. This appears to show that Parliament was not meaning profits up to the end of the year of assessment to be the basis of the average. In the same way, if the end of the period is when the trader makes his statement, this may be more than three years from the commencement of the business, and therefore not a shorter period. It may further be said that to get a figure by calculation on an average taken from another period, rather assumes that the second period is one of fact, not of estimate, and points to the period from which the average is taken as one terminating before the year of assessment, which would be for the trader an actual period

of which there would be no hardship in expecting him to know the profits, and use them as a basis of calculation.

If I were to legislate, I do not think I should take this view, as if a business starts a month before the year of assessment, it seems rather absurd to calculate the profits of the year of assessment on those of the first month of the business, which would probably be non-existent, while if the business started a month after the commencement of the year of assessment, you are to take the actual profits of the first eleven months, disregarding them if the business has continued for thirteen months.

But we are not to legislate; we are to construe the Act; and while the construction seems to me very difficult, because we have very few bricks to build with, yet, considering that Parliament contemplates a shorter period than three years as the foundation of the average, and I think contemplates that the foundation of the average is a period of fact, not estimate, I have with considerable hesitation come to the conclusion that the Commissioners and Rowlatt J. have taken a correct view of the case, and that the period from which the average is derived terminates at the commencement of the year of assessment, or possibly on the date preceding that year to which the accounts of the trader are usually made up, if such a date exists. Their view in the present case I understand to be that the period from which the average is to be obtained is that terminating on April 5, 1919, though these profits in turn are to be obtained by an average from the period up to December 31, 1919, the profits of which are known. The first part of the statement is, I think, the important one for general use, and is correct.

For these reasons, in my opinion the appeal should be dismissed. I agree with the result obtained by the Commissioners and Rowlatt J. by the Court in the *Burntisland* case (1), and Lord Johnston in the *Glensloy* case (2), if the question is the proper interpretation of the statute.

SARGANT L.J. The decision of the questions involved in this appeal depends entirely, or almost entirely, on the true

(1) 8 Tax Cas. 409. (2) 6 Tax Cas. 453.

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view of the relationship between two rules which under the Income Tax Act, 1918, are applicable to cases within Sch. D to that Act. The first of these two rules (which may for brevity be referred to as the earlier rule) is the single rule applicable to Case I. The second of the two rules (which may for brevity be referred to as the later rule) is sub-r. 2 of r. 1 of the Rules applicable to Cases I. and II.

By the earlier rule the tax on a trade is to be computed "on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding in the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment." Under this rule therefore the period of computation is one of which both termini are necessarily fixed prior to and outside of the year of assessment. Under the later rule where the trade "has been set up and commenced within the said period of three years"—which is the case here—"the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI." And under the second rule of Case VI. the computation is to be made "either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the Commissioners." It is clear therefore that the earlier part of the later rule fixes the beginning or terminus a quo of the period of assessment, but does not in terms fix the end or terminus ad quem of that period, while on the other hand the later part of the later rule does not absolutely fix either terminus of the period of computation, but leaves both to the determination of the Commissioners.

A great majority of the trades in respect of which returns have to be made under Sch. D have, of course, been set up for more than three full years before the year of assessment. Accordingly the earlier rule is that which applies in the

great majority of cases, and is naturally stated in general terms without any express words of limitation or exception. If then the later rule is to be regarded as being in the nature of an exception to or qualification of the earlier rule, it may follow that the general terms of the earlier rule apply to the later rule, except so far as expressly or impliedly provided in the later rule; and accordingly that, though the later rule does not state any terminus ad quem for the period of computation, the terminus ad quem must be one which, like the corresponding terminus under the earlier rule, lies altogether outside of the year of assessment. On the other hand, if the later rule is not of the nature of an exception from or qualification of the earlier rule, then it would seem that no implication could properly be drawn from the earlier rule that the terminus ad quem in the later rule must correspond with that in the earlier rule in lying outside the year of assessment.

Now a careful consideration of both the earlier rule and the later rule drives me to the conclusion that the later rule is not of the nature of an exception from the earlier rule, and does not merely qualify certain classes of cases which prima facie lie within or form part of those comprised in the earlier rule. For the language of the earlier rule clearly implies that it extends only to trades that have completed three full trading years before the year of assessment, that is to trades which, however great their majority may be, do not include any trades that have not completed these three full years. On the other hand it is to this latter class of trades, and to them alone, that the later rule is directed. And accordingly, the two rules deal separately with two separate, and mutually exclusive classes of cases, and that none the less because the class dealt with by the earlier rule is much more numerous than the class or classes dealt with by either part or both parts of the later rule.

This conclusion is rendered even clearer if attention is paid to the class of trades dealt with by the second part of the later rule. In these trades there is no fixed terminus for either end of the period of computation, there is not even the

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terminus a quo which is set up in the earlier part of the rules. The period for computation may coincide with that from the setting up to the end of the year of assessment, or it may be a shorter or longer period, in the latter of which cases it must necessarily include a period after the expiration of the year of assessment. It is obvious therefore that an approximation to accuracy is, in this case at least, preferred to promptitude in calculation, and that there is no radical objection to a delay occasioned by an ascertained result being substituted for a mere estimate. If then a comparison is made between a case where a trade is set up a month before the beginning of the year of assessment and one where a trade is set up a month after, why should the profits in the first case be computed on an estimate based solely on the result of the first month's trading, while in the later case the profits can be computed on the ascertained result of eleven months' trading or even of a longer period? I can see no satisfactory answer to this question on the respondents' view. And it is not unimportant to note that, in the Act itself, the two classes of cases under the first and second part of the latter rule are more closely associated than are the two classes of cases under the earlier rule and the first part of the later rule respectively; and that, so far as this goes, one ought perhaps in considering the provisions of the first part of the later rule to pay rather more attention to the second part of the later rule than to the earlier rule.

It has indeed been pointed out by counsel for the respondents, that in the corresponding section of the Act of 1842 the substance of the later rule is contained in two provisos to a section the main part whereof is similar to the language of the earlier rule; and it has been argued that since the Act of 1918 is a consolidating Act the same effect must be given to the later rule as if it had been expressed by way of proviso to the earlier rule. But, if the substance of the section in the Act of 1842 is looked at, it appears to me that, for the reasons already mentioned, the two provisos in question, though expressed as provisos, were in fact independent enactments dealing separately with classes of cases not

previously touched by the earlier part of the section. And I think that the Attorney-General completely met this argument by the reply that the Act of 1918 did not alter the Act of 1842 in this respect, but merely recognized that the provisions which had previously been expressed by way of provisos were really independent enactments and should be so treated in the consolidating Act.

If then, in construing the later rule, no inference can properly be drawn from the mention of a terminus ad quem in the earlier rule, and the words of the later rule are to be read as they stand and as constituting a separate and independent enactment, is there anything in the words themselves to prevent the computation from embracing the whole or a part of the year of assessment? I cannot find anything in the words to suggest such a prohibition, nor does it seem reasonable that such a prohibition should be imposed. After all, the object of the legislation is to provide a fair and reasonable method of computing, with a view to taxing, the profits of the year of assessment. In the ordinary case, where the trade has been set up for more than three years, there are obvious practical advantages in estimating the profits of the year of assessment on the average of the three preceding years. But, in cases where this method is not practicable, I can find no reason or advantage in an arbitrary limitation of the period for the computation of profits to the period, however short it may be, which has occurred between the date of setting up and the commencement of the year of assessment. The result of such a rule would be in many cases, of which the present is an instance, to introduce quite unnecessary elements of hazard and chance into the computation.

The learned judge here obviously felt himself bound in comity, if not technically, to follow the reasoning in the decision of a Scottish Court of first instance in *Burntisland Shipbuilding Co.* v. *Weldhen* (1), which distinguished and to some extent doubted a previous decision of a Scottish Court in *Glensloy Steamship Co.* v. *Lethem.* (2) The actual decisions in these

(1) 8 Tax Cas. 409. (2) 6 Tax Cas. 453.

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cases were on facts somewhat different from those here; and in any case they do not in any sense bind this Court. But they are of course to be treated with respect and must be duly considered.

In the *Glensloy* case (1) the trade had been begun on September 13, 1911, the year of assessment was that from April, 1912, to April, 1913, and the first profit and loss account was for the period ending on November 20, 1912. The Inland Revenue claimed to compute profits for the year of assessment on an average of the profits from September 13, 1911, to November 20, 1912. The company objected to this, contended that there was an inflexible rule of income tax law "that you must never, in assessing the trading profits for one year, encroach upon that year" (2), and claimed to be assessed on an average of the profits from September 13, 1911, to April 5, 1912. The majority of the Court rejected the company's general contention, and adopted the period for computation of the Inland Revenue. This is, in my view, a direct decision against the importation into the later rule above referred to of the terminus ad quem fixed by the earlier rule. But it may be that the decision is somewhat weakened, not only by the dissent of Lord Johnston, but also by the fact that the alternative method of computation suggested by the company did in fact, though not in name, take into account profits earned in some part of the year of assessment, since they arrived at the profits of the period September 13, 1911, to April 5, 1912, on an average of the estimated profits from September 13, 1911, to July 25, 1912.

In the *Burntisland* case (3) the trade was set up in the middle of May, 1918; the first accounts were made up to March 31, 1919, and the second accounts for the twelve months to March 31, 1920, and the year of assessment was April, 1919–1920. The Inland Revenue claimed to assess on the average of the profits for the twenty-two and a half months from the middle of May, 1918, to March 31, 1920, or on an alternative basis taking in part of the profits after

(1) 6 Tax Cas. 453. (2) Ibid. 461.
(3) 8 Tax Cas. 409.

March 31, 1919, which need not be further referred to. The company contended that the computation should be on the average of the profits for the ten and a half months from the middle of May, 1918, to March 31, 1919, and the Court unanimously held this to be the right principle. The decision is one on facts substantially different from those in the present case, but its importance lies in the reasoning of the judgments and particularly in the observations there made on the *Glensloy* case. (1) There are indications all through the judgment of the Lord President and a clear statement in the judgment of Lord Cullen that the true reading of the first part of what I have called the later rule is that "where the period of trading antecedent to the year of assessment is shorter than three complete years, the materials for computing the artificial amount of profit for the year of assessment consist of the results of the trading for such shorter antecedent period." And the Lord President went so far as to justify the decision in the *Glensloy* case (1) on the ground that the results of the first balance sheet, though not directly relevant, might be used evidentially in order to ascertain the average of the profits for one year from the period of the first setting up. (2)

In the present case the learned judge has, as I understand his judgment, acted on this suggestion of the Lord President, and while in fact calculating the taxable profits of the company for the year of assessment as 1200*l.*, being twelve-tenths of the actual profits from March 1, 1919, to December 31, 1919, has avoided bringing in directly any profits in the year of assessment—namely, April, 1919, to April, 1920—by the double process of first treating the 1000*l.* profits for the period of ten months as mere evidence that the profits for the month of March alone were 100*l.*, and then multiplying this monthly profit of 100*l.* by twelve, so as to arrive at the ultimate profit of 1200*l.* for the year 1919–20.

This process is in my judgment more ingenious than sound. It first treats the later rule as impliedly prohibiting any computation based on profits during any part of the year of assessment; and then, while really taking into account

(1) 6 Tax Cas. 453. (2) 8 Tax Cas. 409, 420.

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some of those profits—namely, those from March 31 to December 31, 1919—suggests that they are not so brought in, because they are merely used evidentially in arriving at the real profits for the month of March, 1919, and because it is this single month's profits only that are subsequently used as a basis for calculating the profits of the whole twelve months of the year of assessment. It seems to me impossible to hold that the employment of this double process makes any real difference. It must be the same thing, whether the actual profits for the month of March, 1919, and for the succeeding nine months are at once multiplied by the fraction twelve-tenths to arrive at the profits for the year April, 1919, to April, 1920, or whether the profits for the same month of March and the same nine succeeding months are first divided by ten to arrive at the profits for the single month of March, 1919, and are subsequently multiplied by twelve to ascertain the profits for the year April, 1919, to April, 1920. In either case the actual profits for the nine months of the year of assessment are employed to precisely the same extent in the process of ascertaining the profits of the year of assessment. But if once there is eliminated from the later rule, as I think there should be, any implication that the period for computation should be entirely prior to the year of assessment, it seems to me that the period suggested by the Crown here is a much more natural one than that suggested by the respondents. The Crown's thirteen months end with the close of the first complete trading year of the respondents, a date at which in the ordinary course of events there would have been the first ascertainment of the profits of the trade. The respondents' ten months end at a purely arbitrary date, unconnected with their ordinary trading, a date which happens to be that on which accounts were made up for an altogether distinct purpose.

I agree, therefore, that the judgment of Rowlatt J. should be reversed, and that the assessment for income tax for the year 1919–20 on the respondent firm and the respondent company together should be made in the sum of 12,138*l.*, leaving that total sum to be subsequently apportioned between

the respondent firm and the respondent company. The form of our order will be that stated by the Master of the Rolls.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitor for respondents: *F. B. Brook, for A. V. Hammond & Co., Bradford.*

W. I. C.

FISHER *v.* WALTERS.

1926 *May* 6.

Landlord and Tenant—Implied Condition that Dwelling-house will be kept fit for human Habitation—Damage through latent Defect—Absence of Notice—Liability of Landlord—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 14, 15.

Owing to a latent defect the ceiling in one room of a house to which the Housing, Town Planning, &c., Act, 1909, applied, fell and damaged the tenant's furniture. Being unaware of the defect, which could only be detected by an expert examination, the tenant had given no notice to the landlord with regard to it. In an action by the tenant claiming damages for a breach of the undertaking by the landlord implied by s. 15 of the Act of 1909 to keep the house in all respects reasonably fit for human habitation, the county court judge gave judgment for the plaintiff:—

Held, affirming the decision of the county court judge, that the absence of notice to the landlord of the latent defect in the ceiling did not preclude the tenant from recovering.

Hugall v. *M'Lean* (1885) 53 L. T. 94 distinguished.

Quaere, if where the defect is patent notice by the tenant is not essential to entitle him to recover.

APPEAL from Lambeth County Court.

The plaintiff, who was the tenant of the defendant of a house coming within the provisions of the Housing, Town Planning, &c., Act, 1909 (1), claimed damages for a breach of the condition implied by ss. 14 and 15 of that Act.

(1) Housing, Town Planning, &c., Act, 1909, s. 14: "In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding—

(*a*) in the case of a house situate in the administrative county of London, 40*l.*;

. . . . . .

there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. . . . ."

Sect. 15, sub-s. 1: "The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition

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The plaintiff had been tenant of the house for fifteen years. In 1912 a portion of the ceiling in one of the rooms fell, but was repaired by the landlord. In October, 1925, the same ceiling fell again and damaged the plaintiff's furniture, and it was in respect of this damage that the action was brought. As the plaintiff, before the ceiling fell, saw no sign of it giving way, he could not, and did not in fact, give notice to the landlord of the condition of the ceiling before the accident.

The county court judge was of opinion that the defect was a latent defect which could not be detected by any one except an expert builder; that the ceiling had been badly built and should have been tested, and that a house with such a ceiling was not reasonably fit for human habitation. He accordingly gave judgment for the plaintiff, assessing the damages at 15*l.*

The defendant appealed.

Duckworth for the defendant. Sects. 14 and 15 of the Housing, Town Planning, &c., Act, 1909, do not impose a higher duty upon the landlord than is cast upon him by a repairing covenant in a lease, and under such a covenant his liability arises only if he has received notice of want of repair: *Makin* v. *Watkinson* (1); *Hugall* v. *M'Lean* (2); *Murphy* v. *Hurly* (3); *Griffin* v. *Pillet.* (4) Where the law casts an obligation upon a person it says that it shall be reasonable: per Rolfe B. in *Vyse* v. *Wakefield.* (5) Construing the condition implied in ss. 14 and 15 of the Act of 1909 reasonably involves that before any liability is cast upon the landlord for non-repair he shall have had notice. The sections do not make the landlord an insurer, in this respect differing from the Factory Acts, which impose upon

implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation."

Sub-s. 2 enables the landlord or the local authority, on giving twenty-four hours' notice in writing to the tenant or occupier, to enter any house to which the section applies to view the condition thereof.

[The foregoing provisions are reproduced in substance in s. 1 of the Housing Act, 1925.]

(1) (1870) L. R. 6 Ex. 25.

(2) 53 L. T. 94; 33 W. R. 588.

(3) [1922] 1 A. C. 369.

(4) [1926] 1 K. B. 17.

(5) (1840) 6 M. & W. 442, 456.

an employer an absolute duty to keep his premises in a fit state by fencing machinery. The obligation under the Act of 1909 is purely contractual: see per Lord Reading C.J. in *Ryall* v. *Kidwell & Son.* (1) In the same case Phillimore L.J. indicated (2) that notice was necessary to make the landlord liable. *Walker* v. *Hobbs & Co.* (3), which was cited to the county court judge, does not touch the present point. There it was admitted that the condition had not been fulfilled, and the question argued was what was meant by the word "condition."

Ritter for the plaintiff was not called upon.

The judgments were delivered in the following order:—

FINLAY J. This is an appeal in an action brought by the plaintiff, the tenant, against the defendant, the landlord, for damages in respect of the fall of a ceiling in the house which had been occupied for many years by the plaintiff. The claim is based upon ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909. It is common ground that the house is one to which those sections are applicable; and the contest before the county court judge, and before us, was whether the plaintiff had established either that the house was not at the commencement of the holding reasonably fit for human habitation within s. 14, or that it was not, during the holding, kept by the defendant in all respects reasonably fit for human habitation within s. 15. There is no dispute that in 1925 there was a fall of the ceiling in one of the rooms, and, further, that the defect could not have been discovered by an ordinary examination, as distinguished from a thorough inspection by an expert, before the ceiling fell. In those circumstances the county court judge held that the ceiling having fallen in the way it did the plaintiff was entitled to succeed, as, in his opinion, there had been a breach of the condition implied by s. 15 of the Act. For the defendant it is said that the judge was wrong in so holding, and the argument in support of that contention is that the

(1) [1914] 3 K. B. 135, 140. (2) Ibid. 142.
(3) (1889) 23 Q. B. D. 458.

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sections of the Act of 1909 place landlords and tenants in precisely the same position as if covenants to the same effect were contained in a lease of the premises, and that inasmuch as under a repairing covenant by a landlord no liability is cast upon him in the absence of notice of non-repair, so here the tenant is precluded from recovering, as he gave no notice of any defect. It is further said that in any event there was no evidence of any defect under s. 14. If the matter had depended upon that section, widely different considerations would have been applicable. It may well be that the circumstance that for eleven years this ceiling had stood would have been cogent evidence that there was no defect at the time of the letting. I certainly should not be prepared to hold, and it is not necessary, in order to support the decision of the county court judge, to hold that at the commencement of the holding the house was not in all respects reasonably fit for human habitation.

Now we come to s. 15, as to which the argument is, as I have said, that inasmuch as no notice was given by the plaintiff of any defect, he is precluded from recovering. I do not propose to decide more than is necessary in this case, and I do not think it necessary to review the series of cases brought to our attention by Mr. Duckworth, for in my view the judgment of the county court judge can be supported upon the ground that this being a case of a latent defect, no notice could be given by the tenant, because he had not discovered, and could not with reasonable diligence have discovered, it. I am not aware of any authority which decides, as between landlord and tenant, that if the tenant could not have discovered the defect he is precluded from suing by reason of the absence of notice, and there are authorities which tend the other way. In the statute we are considering nothing is said about notice, and it is impossible, in my opinion, to hold upon the words of s. 15 that it is necessary that the tenant, in order to be able to recover, should give notice of a defect of which he did not know and could not by reasonable diligence have known. What the section requires is that the house shall, during the holding,

be kept by the landlord in all respects reasonably fit for human habitation. Here the landlord was entitled to obtain access to the house to view its condition—see s. 15, sub-s. 2—and there is nothing in the Act which cuts down the plain words of the section or entitles us to introduce words into it either importing that notice must be given before a tenant can recover, or suggesting that premises are reasonably fit for human habitation where, as here, the fact that they are not reasonably fit is because the defect is latent. The question is: was this house during the whole time kept by the landlord reasonably fit for human habitation? The ceiling fell down. Res ipsa loquitur. The house was not kept by the landlord reasonably fit for human habitation. That to my mind decides this case.

I only desire to say, as the county court judge did, that in this case nothing in the nature of moral blame attaches to the landlord or the agents; but the fact remains that there has been a breach of the condition imposed by s. 15, and accordingly the landlord has no answer. The appeal must be dismissed.

MACKINNON J. I agree. Sections 14 and 15 of this Act are headed "Contracts by landlords," and both enact that in any contract there shall be deemed to be included a stipulation to a certain effect. Mr. Duckworth has contended that where a statute enacts that a landlord's contract shall be to such and such an effect, the statutory part of that contract is the same as it would be in a contract voluntarily entered into by him containing similar terms. Mr. Duckworth drew our attention to a number of cases in which the landlord has been held liable under his covenant to repair only where the tenant has drawn his attention to the need of repair, but the majority of those cases deal with patent defects as to which the tenant has had ample means of knowledge. There is only one case, I think, in which the principle that the tenant must first draw the attention of the landlord to the lack of repair has been applied with regard to a defect which the tenant could not see or know of—the case of

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Hugall v. *M'Lean*. (1) That case, which certainly extended the principle to its extreme limit, was commented upon in *Murphy* v. *Hurly*. (2) Lord Buckmaster there said (3): "The strongest case in favour of the respondent is the case of *Hugall* v. *M'Lean*. (1) It was an action on a covenant by a landlord to keep in repair the drains of a house, and the jury found that the plaintiff, who was tenant, had not the means of knowing that the drains were defective, whilst the landlord had, although he did not in fact know. The Master of the Rolls held notice was necessary to establish liability, and followed the case of *Makin* v. *Watkinson*. (4) The case does not appear to have been very fully reported, and it is difficult to reconcile the decision with the findings of fact on the part of the jury, but it is easy to understand the case if it be regarded, as the Master of the Rolls appears to have thought it should, as an ordinary case of a covenant to repair part of the demised structure that was in fact in the occupation of the tenant." Lord Sumner, commenting upon the same case, said (5): "The furthest point to which this rule has hitherto been carried is *Hugall* v. *M'Lean* (1), a decision of the Court of Appeal. There the tenant had neither knowledge of the want of repair nor means of knowledge, yet she failed to make the landlord liable, because she had not given him a notice, which she could not have given. The covenant was, however, an ordinary repairing covenant in an agreement for a lease of a dwelling-house, and the Court felt bound to adhere to the established rule of construction, on the faith of which, no doubt, numbers of leases had been entered into, the maxim lex non cogit ad impossibilia notwithstanding. It is enough to-day to point out that the present is not a case of a covenant in common form in an agreement for a lease of a dwelling-house, and that the defect complained of in that case was a defect in the drains of the particular house of which the tenant was in sole occupation. It would appear from the report in 1 Times L. R. 445 that the Court

(1) 53 L. T. 94; 33 W. R. 588.
(2) [1922] 1 A. C. 369.
(3) [1922] 1 A. C. 376.
(4) L. R. 6 Ex. 25.
(5) [1922] 1 A. C. 389.

felt that it was carrying the rule to its extreme limit." It is to be observed that one of the grounds of reasoning of the Master of the Rolls in deciding *Hugall* v. *M'Lean* (1) was that there was no covenant enabling the landlord to enter, and so he could not enter without permission, thus differing very materially from what I may call the statutory covenants imported by ss. 14 and 15 of the Act of 1909, because by s. 15, sub-s. 2, it is enacted that the landlord or the local authority may, on giving twenty-four hours' notice in writing to the tenant or occupier, enter the demised premises for the purpose of viewing the state and condition thereof. So that the only case as regards the ordinary landlord's covenant carrying the principle far enough in favour of the defendant is one where the landlord had no opportunity of entering to see the condition of the premises. In this case, if we applied *Hugall* v. *M'Lean* (1), which I infer is not a very satisfactory decision and which carries the principle to its extreme limit, we should be carrying the principle still further, because of the absence here of the factor, existing in that case, that the landlord could not enter and view the state of the premises. I think this appeal could succeed only if Mr. Duckworth could have persuaded us to apply the principle applied in *Hugall* v. *M'Lean* (1), but if we did so we should be carrying it even beyond the extreme limit to which, according to Lord Buckmaster and Lord Sumner, it was carried in that case. I agree that the appeal must be dismissed, but in so deciding we say nothing as to the position where there is a patent defect as to which the tenant could notify the landlord. In such a case different considerations would in my view arise from those which arise in this case, but it is unnecessary to discuss them at present.

Appeal dismissed.

Solicitor for plaintiff: *W. H. Jamieson.*
Solicitors for defendant: *Huntley, Son & Phillips.*

(1) 53 L. T. 94; 33 W. R. 588.

J. S. H.

1926
May 6.

FINEY *v.* GOUGOLTZ.

Landlord and Tenant—Rent Restriction—Decontrol—Lessee under long Lease in Possession—Whether Lessee "landlord"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 7—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

The defendant was the holder of a lease for ninety-nine years, expiring in 1940, of a dwelling-house at a ground rent of 10*l.* a year. In January, 1925, she was in possession of the whole house, the standard rent of which was 60*l.*; and in February, 1925, she let an unfurnished room therein, together with part use of the scullery, to the plaintiff at a weekly rent of 16*s.* The defendant having levied a distress on the plaintiff's goods for unpaid rent at this rate, the plaintiff brought an action for damages, alleging that on an apportionment the rent of 16*s.* was more than he was liable to pay under the Rent Restriction Acts:—

Held, that the defendant was the "landlord" of the house within the meaning of s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923; that the principal Act of 1920 ceased to apply to the room let to the plaintiff; and that the distress for rent at 16*s.* a week was therefore lawful.

Opinion of Lord Darling in *Jenkinson* v. *Wright* [1924] 2 K. B. 645 approved and followed.

APPEAL from Bloomsbury County Court.

The defendant held a lease for ninety-nine years, expiring in 1940, of a house at a ground rent of 10*l.* a year. In January, 1925, the defendant was in possession of the whole house, and in February, 1925, she sublet an unfurnished room in the house, with part use of scullery, to the plaintiff at a weekly rent of 16*s.* The standard rent of the whole house was 60*l.* The plaintiff paid the rent of 16*s.* a week for some time, and then refused to continue payment at that rate, alleging that it was more than he was liable to pay under the Rent Restriction Acts. The defendant then levied a distress for the rent in arrear at that rate, whereupon the plaintiff brought an action for an injunction and for damages for illegal distress, and he also took out a summons for an apportionment of the rent. It was admitted on behalf of the defendant that if the plaintiff was entitled to an apportionment the rent would be so reduced as that no rent was owing at the time of the distress, which therefore would

be illegal. Whether this was so or not turned on the point whether the room was decontrolled within s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923. (1)

The county court judge held that the defendant was not the "landlord" of the house within s. 2, sub-s. 1, of the Act of 1923; that the defendant was only a tenant, and that the case came within the proviso to that sub-section; that the plaintiff's room was not decontrolled; and that the plaintiff was entitled to recover damages as for an illegal distress, these being assessed at 3*l*.

The defendant appealed.

R. J. Sutcliffe for the defendant. The defendant as the lessee under a long lease at a ground rent which is less than two-thirds of the rateable value of the house is the "landlord" of the house within s. 2, sub-s. 1, of the Act of 1923. For the purposes of the Acts the defendant's tenancy under such a lease is to be taken as non-existent: see s. 12, sub-s. 7, of the Act of 1920, which provides that "where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." The proviso to s. 2, sub-s. 1, of the Act of 1923 applies only where there are three

(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house:

"Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sublet, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act."

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parties—a landlord, a tenant, and a sub-tenant; it has therefore no application in this case, where there are two parties only—a landlord (the defendant) and a tenant (the plaintiff). In *Jenkinson* v. *Wright* (1) Lord Darling took the view now contended for that the holder of a long lease, of which a substantial portion remains unexpired, is, for this purpose, in the position of a landlord and not of a tenant. It follows therefore that by virtue of s. 2, sub-s. 1, of the Act of 1923 the Acts ceased to apply to the room let to the plaintiff, that the defendant was not limited as to the rent she could charge, and that the distress was therefore lawful.

Ritter for the plaintiff. *Jenkinson* v. *Wright* (1) did not decide the point for which it is cited. Lord Darling took the view now contended for by the defendant, but his observations were obiter, and certainly Rowlatt J. in the same case does not appear to have shared Lord Darling's view. If the Act of 1923 had intended that a long leaseholder should be treated as the freeholder it would have said so in terms. It has not done so. The freeholder of this house is the landlord, and the defendant is only a tenant.

MACKINNON J. stated the facts and continued: In the county court the contest was whether the defendant could say that the dwelling-house in question had become decontrolled by virtue of s. 2, sub-s. 1, of the Rent Restriction Act, 1923. The county court judge held that the dwelling-house was not decontrolled, but remained subject to the Acts, and therefore that the defendant distrained for an excessive rent. The question is whether the county court judge was right in so deciding. It is a difficult question, depending in my view not merely upon the language of s. 2, sub-s. 1, and the proviso of the Act of 1923, but also upon certain provisions of the Act of 1920. The defendant's contention is that she is the "landlord" of the house within s. 2, sub-s. 1, of the Act of 1923, that at the passing of that Act she was in possession of the house or came into possession of it after that date, and therefrom that the principal Act

(1) [1924] 2 K. B. 645.

ceased to apply to it. For the plaintiff it is said that that is not so, as the defendant is not the "landlord," as is shown by the proviso to s. 2, sub-s. 1, which reads as follows: "Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sublet, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act." That proviso seems to me to contemplate what I may call a head landlord, his tenant, whom I may call a sub-landlord, and an occupying tenant of part of the house, who therefore is the tenant of the sub-landlord. It is said for the plaintiff that the defendant is not the head landlord, and that the head landlord is the freeholder entitled to the reversion on the expiration of the lease held by the defendant. There is no definition of a "landlord" in the Acts, except that in s. 12, sub-s. 1 (*f*), of the Act of 1920 it is said that "the expressions 'landlord' . . . . include any person from time to time deriving title under the original landlord . . . . ," but that does not carry the matter any further. There is, however, another provision in the Act of 1920—s. 12, sub-s. 7—which says this: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." It is not disputed that the 10*l.* a year ground rent which the defendant pays under her lease is less than two-thirds of the rateable value of the house, and the effect of the sub-section I have just read is that although this is a house to which the Acts apply by virtue of its annual value, yet the Acts are to apply to it as if no such tenancy existed between the freeholder and the defendant or ever had existed, and if that is so, the result is that although the house is

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subject to the Acts, the defendant must be treated as the landlord within s. 2, sub-s. 1, of the Act of 1923. It follows that the proviso to that sub-section does not apply, because there are no three persons, a freeholder, a sub-landlord and a sub-tenant, and the effect of s. 12, sub-s. 7, is to eliminate the freeholder in such a case as this. The defendant's contention is therefore right that at the time the room was let to the plaintiff the dwelling-house was decontrolled, from which it follows that the distress for the rent calculated at 16*s.* per week was justified.

A very similar question was discussed in *Jenkinson* v. *Wright* (1), which (it is fair to the county court judge to say) was not brought to his attention. In that case the facts were very much the same as those in this case, except for a difference of figures and dates, and the fact that there the tenant under the ground lease had mortgaged her interest therein and attorned tenant to the mortgagee. It was argued there that the proviso to s. 2, sub-s. 1, of the Act of 1923 applied by virtue of the plaintiff being tenant to her mortgagee and not by virtue of being tenant to her ground landlord. The plaintiff was in fact tenant to her mortgagee at a peppercorn rent, or at a rent less than two-thirds of the rateable value of the house. There Lord Darling expressed the opinion that by virtue of s. 12, sub-s. 7, of the Act of 1920 the lessee under a ground lease of this kind is not the "tenant" within the meaning of the proviso to s. 2, sub-s. 1, of the Act of 1923, but is the "landlord" within the meaning of sub-s. 1 of s. 2. Rowlatt J. seems in effect to have taken the same view, for in the earlier part of his judgment he says: "The plaintiff is not in possession of the premises because she attorned tenant to the mortgagee at the rent of a peppercorn, but because she is the holder of the unexpired term of the lease and therefore the owner of the property." In a later part of his judgment he said: "There is another point which might have emerged if it had been taken in the county court—namely, it might have been said that inasmuch as the plaintiff was the lessee

(1) [1924] 2 K. B. 645, 650.

of the property for an unexpired term of years, she was therefore herself a tenant, and the house was still within the Rent Restriction Acts by virtue of the proviso to s. 2, sub-s. 1, of the Act of 1923. I do not know whether or not such a contention could be supported. It was however not raised before the county court judge and therefore does not arise here. It may be that on the facts s. 12, sub-s. 7, of the Act of 1920 would have been an answer to that point also." It may be, as Mr. Ritter has contended, that *Jenkinson* v. *Wright* (1) does not decide this point, but the judgment of Lord Darling in terms deals with it, and I gather that Rowlatt J. did not dissent from his view. At all events, my own opinion is that the defendant was the landlord of this house within the meaning of s. 2, sub-s. 1, of the Act of 1923, and by reason of her having had possession of the whole house at the time the room was let to the plaintiff, that room became decontrolled. Judgment therefore ought to have been entered for the defendant, and the appeal must be allowed.

FINLAY J. Agreeing as I do both with the reasons and the conclusion of MacKinnon J., I shall only add a few words. I agree that s. 2, sub-s. 1, of the Act of 1923 contemplates three parties, a landlord, a tenant and a sub-tenant, and that within the expression "landlord" it includes a long leaseholder, as the effect of s. 12, sub-s. 7, of the Act of 1920 is to eliminate the lease altogether in a case such as this, with the result that we are left with not three but two parties only. With regard to *Jenkinson* v. *Wright* (1) it is clear that Lord Darling expressly dealt with the exact point raised before us, although there may be some doubt with regard to the judgment of Rowlatt J. The first part of Rowlatt J.'s judgment seems to be entirely in favour of the view we are taking, and even in the later part, although he says that this point was not taken in the county court, he adds that on the facts it may be that s. 12, sub-s. 7, of the Act of 1920 would have been an answer, by which

(1) [1924] 2 K. B. 645, 650.

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I understand him to mean that if the rent in that case had been less than two-thirds of the rateable value of the house, the result would be that which Lord Darling indicated.

Appeal allowed.

Solicitors for plaintiff: *Nimmo & Harvey.*
Solicitor for defendant: *Harry Chandler.*

J. S. H.

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June 4, 7.

NEWMAN *v.* SLADE.

Landlord and Tenant—Notice to quit—Weekly Tenancy—Length of Notice required.

In the absence of agreement to the contrary, a weekly tenancy may be determined by a calendar week's notice given on the day corresponding to that on which the tenancy commenced. A notice of seven clear days is not required.

Fleury v. *O'Reilly* (1905) 40 I. L. T. 125 and *Sullivan* v. *Sheehan* (1916) 50 I. L. T. 41 followed.

Weston v. *Fidler* (1903) 88 L. T. 769 distinguished and not followed.

APPEAL from Bow County Court.

The plaintiff let certain premises to the defendant on a weekly tenancy from Monday to Monday at a rent of 11*s.* per week. On Monday, February 8, 1926, the plaintiff gave the defendant notice to quit on February 15, but as the defendant refused to quit the plaintiff brought an action to recover possession. The county court judge held that the notice to quit was valid, and gave judgment for the plaintiff.

The defendant appealed.

O'Malley for the defendant. It appears to be now settled that, in the absence of specific agreement on the subject, a week's notice is necessary to determine a weekly tenancy: see *Queen's Club Gardens Estates* v. *Bignell* (1); but the question here is, what is a week's notice? It is submitted that a notice of seven clear days is necessary to determine the tenancy. That was the view taken in *Weston* v. *Fidler*. (2)

(1) [1924] 1 K. B. 117. (2) 88 L. T. 769.

There, where it was agreed that the tenancy might be determined by the giving of one week's notice by either party, a notice given on November 17 to expire on November 24 was held bad. In his judgment Wills J. said it was convenient "to follow the old rule that the requisite notice must be one which leaves seven clear days. I see no reason for departing from the usual rule of construction in these matters, which is, that a fraction of a day is not to be counted in the length of notice, and therefore the notice in this case was not a good notice." "Clear days" are "to be reckoned exclusive both of the first and of the last day": County Court Rules, Order LV. Applying that rule, the notice to quit in this case was bad.

[He also referred to *Harvey* v. *Copeland* (1) and *Sidebotham* v. *Holland*. (2)]

H. W. M. Potter for the plaintiff. In *Sidebotham* v. *Holland* (3) Lindley L.J. said that the usual way of reckoning time in connection with notices to quit is to count in one of the extremes and to exclude the other. It follows, therefore, that a calendar week's notice is sufficient, and it has been so held in two Irish cases: *Fleury* v. *O'Reilly* (4) and *Sullivan* v. *Sheehan*. (5)

[He was stopped.]

SALTER J. This appeal raises a short point, but one of importance, because it is extremely desirable that in the case of weekly tenancies there should be a plain and simple rule as to the notice required to be given by either party to determine them. In this case the tenancy was what is called a Monday to Monday tenancy, that is, a weekly tenancy from Monday to Monday, and the landlord purported to determine it by a notice given on Monday, February 8, to quit on Monday, February 15. The simple point whether that is a good notice ought not to be complicated by any reference to yearly, quarterly or monthly tenancies. I take

(1) (1892) 30 L. R. Ir. 412.
(2) [1895] 1 Q. B. 378.
(3) [1895] 1 Q. B. 378, 384.
(4) 40 I. L. T. 125.
(5) 50 I. L. T. 41.

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it that the law is well settled, that in the case of a tenancy from week to week, unless a contrary intention appears, either party can determine it by a week's notice. In this case the only question is, what is a week's notice? The rule in such cases, which is described by Lindley L.J. in *Sidebotham* v. *Holland* (1) as the usual one, is not to count the day on which the notice is given but to count the day for which it is given. On principle I can see no reason why seven clear days should be required to determine a weekly tenancy, and I think it would be undesirable to establish such a rule, which would only introduce confusion. In the case of a Monday to Monday tenancy to give notice on one Monday for the following Monday is a simple rule; if in such a case it was necessary to give a longer notice, difficulty and uncertainty would be produced. Here the county court judge decided that a notice given on Monday for the following Monday was good, and that a seven clear days' notice was not required. Applying what Lindley L.J. called the usual rule of disregarding the day on which the notice is given and including the day for which it is given, it is plain that the recipient of the notice has seven days' notice, but of course it is essential that he should have the whole of the day for which notice is given.

Turning to the authorities, *Harvey* v. *Copeland* (2) supports the view I am expressing. There a notice to quit was given on Thursday for the following Friday week, and the question was whether that was a good notice. The judgments, however, seem to show that in the case of a weekly tenancy commencing on a Thursday a week's notice expiring on a Thursday would be good. The point was clearly so decided in *Fleury* v. *O'Reilly* (3) and *Sullivan* v. *Sheehan* (4), and the only case which appears to cause any difficulty is *Weston* v. *Fidler*. (5) No doubt there is a passage in the judgment of Wills J. in that case which, if read alone, seems to suggest that in computing the time for determining a weekly tenancy the

(1) [1895] 1 Q. B. 378.
(2) 30 L. R. Ir. 412.
(3) 40 I. L. T. 125.
(4) 50 I. L. T. 41.
(5) 88 L. T. 769.

requisite notice must be one of seven clear days. If, however, the judgment is looked at as a whole, it will be seen that it proceeded upon the particular facts, including the essential fact that by the agreement between the parties the tenancy was to expire at a certain hour—namely, before noon on the Monday. It is obvious therefore that the person receiving the notice in that case did not have the whole of the day for which notice was given, and so did not have seven days. I think that, both on principle and on authority, we must hold that in the case of a tenancy from week to week, where no contrary intention appears, a notice given on the day corresponding to that on which the tenancy commenced and expiring on the corresponding day of the following week is good. Thus, where the tenancy commenced on a Monday, a notice given on a Monday for the following Monday is a good and valid notice. The appeal must therefore be dismissed.

FRASER J. I agree.

Appeal dismissed.

Solicitor for plaintiff: *Walter H. Cowl.*
Solicitor for defendant: *William Daybell.*

J. S. H.

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May 18, 21.

NOBLE *v.* HARRISON.

Nuisance—Tree overhanging Highway—Fall of Branch causing Damage—Liability of Owner of Tree.

A branch of a beech tree growing on the defendant's land overhung a highway at a height of 30 feet above the ground. In fine weather the branch suddenly broke, fell upon the plaintiff's vehicle, which was passing along the highway, and damaged it. In an action by the plaintiff claiming in respect of the damage to his vehicle, the county court judge found that neither the defendant nor his servants knew that the branch was dangerous, and that the fracture was due to a latent defect not discoverable by any reasonably careful inspection, but he held that the defendant was liable (1.) upon the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, and (2.) as for a nuisance:—

Held, reversing the decision of the county court judge, (1.) that the *Rylands* v. *Fletcher* principle had no application, inasmuch as a tree was not in itself a dangerous thing, and to grow trees was one of the natural uses of the soil; and (2.) that the mere fact that the branch overhung the highway did not make it a nuisance, seeing that it did not obstruct the free passage of the highway, and although the branch proved to be a danger the defendant was not liable, inasmuch as he had not created the danger and had no knowledge, actual or imputed, of its existence.

Barker v. *Herbert* [1911] 2 K. B. 633 applied.

Observations of Best J. in *Earl of Lonsdale* v. *Nelson* (1823) 2 B. & C. 302 and *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314 distinguished.

Appeal from Brighton County Court.

The plaintiff claimed to recover from the defendant in respect of damage to his motor coach. The defendant was the owner of an estate known as Buckingham Park, Old Shoreham, on which there was growing a beech tree, eighty years old at least, a branch of which overhung the highway. This branch, which was 20 to 25 feet long, and grew out at a height of 30 feet from the ground, suddenly, in fine weather, broke off at a distance of 15 feet from the trunk, fell upon the plaintiff's motor coach while passing along the highway, and damaged it.

At the trial the county court judge found that neither the defendant nor his servants knew that the branch was dangerous, but that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. He accordingly negatived the allegation of negligence against the defendant. The county court judge, however, held that

although the branch, whilst in its normal condition and whilst secure from falling was not, by reason of its height above the ground, an interference with or a menace to the lawful user of the highway, it had become through the defect in it, due to a crack into which water had penetrated, a menace and a danger to those using the highway, and as such a nuisance, and that that nuisance was the cause of the damage; and further, that the principle laid down in *Rylands* v. *Fletcher* (1) applied. He accordingly gave judgment for the plaintiff, assessing the damages at 48*l.* 11*s.*

The defendant appealed.

Roland Oliver K.C. and *Tristram Beresford* for the defendant. The judgment of the county court judge is not well founded on either of the grounds on which he based it. The *Rylands* v. *Fletcher* (1) principle has no application to a case of this kind. There it was decided that a person who brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, is bound to keep it in at his peril. In that case the owner of land who constructed a reservoir thereon was held liable for the escape of water on to the adjoining land. Similarly, in *Humphries* v. *Cousins* (2) the defendant was held liable for the escape of sewage from his land on to that of the plaintiff's. But there is no analogy between those cases and the present one. The planting of a tree on one's land does not bring anything unusual or dangerous on to it; it is the natural use of land to have trees growing on it. A landowner is not an insurer of his trees.

The other ground on which the county court judge based his judgment was nuisance. As to that, the mere fact that a tree overhangs a highway does not constitute a nuisance. Persons using the highway have merely the right of passing and repassing: *St. Mary Newington Vestry* v. *Jacobs* (3); *Harrison* v. *Duke of Rutland* (4), and in the exercise of that

(1) L. R. 3 H. L. 330.
(2) (1877) 2 C. P. D. 239.
(3) (1871) L. R. 7 Q. B. 47.
(4) [1893] 1 Q. B. 142.

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right they must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid: per Bramwell B. in *Holmes* v. *Mather*. (1) Further, even for a nuisance on his land the owner is not liable, unless he has created it or suffered it to continue if he knew, or ought to have known, of its existence: *Barker* v. *Herbert* (2); see also *Job Edwards* v. *Birmingham Navigations*. (3) The only case which appears to be in conflict with the principle that in the absence of scienter there is no liability for a public nuisance is the Irish decision in *Mullan* v. *Forrester*. (4) There a wall on the defendant's land abutting on a public highway was blown down during a storm and three persons were killed, and the majority of the Court held that the wall being a nuisance it was unnecessary for the plaintiff to prove that the defendant knew, or ought reasonably to have known, of its defective condition. The facts showed that the defendant had taken down certain buildings which supported the wall, and it may therefore be said that he thereby created the nuisance; but if it purports to decide that a person is liable for a public nuisance in the absence of scienter it is inconsistent with *Barker* v. *Herbert*. (2) It is submitted that the dissenting judgment of Moore J. correctly stated the law. Applying the principle established in *Barker* v. *Herbert* (2) to the present case it is clear that this defendant is not liable, because he had neither actual nor imputed knowledge of the branch of the tree being unsound.

N. A. Beechman (*T. Gates* with him) for the plaintiff. It may be difficult to support the county court judge's decision upon the principle of *Rylands* v. *Fletcher* (5), but it was right on the other ground upon which it was based—the ground of nuisance. In Pollock on Torts, 12th ed., p. 411, it is said that "it is an actionable nuisance if a tree growing on my land overhangs the public road or my neighbour's land." For that statement the observations of Best J. in *Earl of Lonsdale* v. *Nelson* (6) and the decision in *Smith* v. *Giddy* (7) are cited.

(1) (1875) L. R. 10 Ex. 261, 267.
(2) [1911] 2 K. B. 633.
(3) [1924] 1 K. B. 341.
(4) [1921] 2 I. R. 412.
(5) L. R. 3 H. L. 330.
(6) 2 B. & C. 302, 311.
(7) [1904] 2 K. B. 448.

Best J. in the former of these cases said this: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them." From that it is clear that a tree overhanging a highway is a public nuisance, and if it causes damage the owner of the tree is liable. In *Lemmon* v. *Webb* (1) no one doubted that overhanging branches constituted a nuisance; the only question there in controversy was whether the person on whose ground they overhung was entitled, without notice, to cut them.

[ROWLATT J. In that case the branches overhung private land; they constituted a private nuisance.]

If a public nuisance causes damage to an individual the owner of the land on which the nuisance exists is liable. A person whose land abuts on a highway is under an absolute duty not to allow it to become a nuisance: *Attorney-General* v. *Tod Heatley* (2); and if it does become a nuisance and causes damage he is liable: see *Wilkins* v. *Day* (3); *Harrold* v. *Watney*. (4) Here, the branch projecting over the highway was in fact dangerous; it constituted a nuisance; and as it fell and caused damage to the plaintiff, the defendant is liable. Moreover the mere fact that it overhung the highway required that the defendant should take steps to ensure that it did not fall: *Tarry* v. *Ashton* (5), and as he failed in that duty he is liable.

[He also referred to *Reg.* v. *Watson* (6); *Chauntler* v. *Robinson* (7); and *Firth* v. *Bowling Iron Co.* (8)]

Roland Oliver K.C. in reply. Branches of a tree which project over a highway are not a nuisance so long as they do not interfere with the right of the public to pass and repass.

(1) [1894] 3 Ch. 1; [1895] A. C. 1.
(2) [1897] 1 Ch. 560.
(3) (1883) 12 Q. B. D. 110.
(4) [1898] 2 Q. B. 320.
(5) 1 Q. B. D. 314.
(6) (1703) 2 Ld. Raym. 856.
(7) (1849) 4 Ex. 163.
(8) (1878) 3 C. P. D. 254.

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The principle of *Tarry* v. *Ashton* (1) has no application to this case, there being no analogy between an artificial structure projecting over a highway and the branch of a tree.

Cur. adv. vult.

May 21. The following written judgments were delivered:—

ROWLATT J. In this case the defendant was possessed of land on which there was growing a beech tree, a limb of which overhung a highway. This bough suddenly broke in fine weather, fell upon the plaintiff's vehicle then passing, and caused damage. The county court judge has found not only that neither the defendant nor his servants knew that the bough was dangerous, but that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. In these circumstances (and it is not necessary to refer to the facts in any greater detail) the county court judge gave judgment for the plaintiff for the amount of the damage.

A claim based on negligence is, of course, out of the question, and the county court judge so held. But he found the defendant liable: (1.) as for a nuisance, and (2.) upon the principle of *Rylands* v. *Fletcher* (2) and *Humphries* v. *Cousins*. (3) In my opinion this last named principle has no application to the present case. A tree is not like the artificial reservoir in the first case or the sewage in the second case, which the persons on whose land they were were held bound to keep from escaping at their peril. To grow a tree is one of the natural uses of the soil, and it makes no difference, in my judgment, whether the tree was planted or self-sown, or with what object—whether for ornament, or for shelter, or for the sake of the timber—it is planted or maintained. Further, a tree is not in itself a dangerous object, though in decay it may become so. I neglect as immaterial for the present purpose trees with poisonous fruit or foliage. I conclude, therefore, that the judgment of the county court

(1) 1 Q. B. D. 314. (2) L. R. 3 H. L. 330.
(3) 2 C. P. D. 239.

judge cannot be supported on this ground, and from this view I gathered that the learned counsel for the plaintiff did not dissent.

It remains to consider the question of nuisance. As to this, it was in the first place contended for the plaintiff that the mere fact that the tree overhung the highway made it a nuisance. This is indeed a far-reaching proposition, especially as it would apply not only to roadways, but to footpaths. If it is sound it would seem that, a fortiori, every lamp so overhanging, every signboard, every clock (including that of the Law Courts), every awning outside a shop, are in themselves illegal erections, not to mention the upper stories corbelled out over the roadway, which were common in every town in the country for centuries. I should have thought it clear that the right of the public in a highway was merely to pass and repass, and that so long as that right was not interfered with they could not complain of what was in the air above or on the earth beneath. Incidentally, it may be observed that if the law is as contended for, the difficult questions discussed in *Wandsworth Board of Works* v. *United Telephone Co.* (1) need never have been mooted. We were pressed, however, as the only authority on the subject, with a few words in the judgment of Best J. in *Earl of Lonsdale* v. *Nelson.* (2) In that case the question was as to the right of a party aggrieved to abate a nuisance, and the learned judge was pointing out the necessity of allowing such a right in cases of immediate peril. I think it is clear that he was speaking of an overhanging tree de facto dangerous or obstructive.

It was next contended that as the tree in fact fell, it was, before it fell, dangerous, and was therefore a nuisance. This way of putting it is independent of the circumstance that the bough overhung the highway. The argument as was admitted by the learned counsel who employed it, would be equally applicable to a tree standing clear of the road, but which fell across it. The point is, however, whether the defendant can be made liable when he neither knew nor ought

(1) (1884) 13 Q. B. D. 904. (2) 2 B. & C. 302.

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to have known of the actual danger. That the answer to this must be in the negative is clear, I think, though the circumstances were very different, from the judgment in *Barker* v. *Herbert*. (1) The result of that and the other cases cited to us is that a person is liable for a nuisance constituted by the state of his property: (1.) if he causes it; (2.) if by the neglect of some duty he allowed it to arise; and (3.) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.

There remains one other question—namely, whether, inasmuch as the tree in fact overhung the road, the defendant was not under an absolute obligation to support it. The point is suggested by the judgments of Lush and Quain JJ. in *Tarry* v. *Ashton*. (2) In that case a lamp attached to the defendant's premises overhung the highway, and it was held by the two learned judges referred to that he was bound to prevent it falling at his peril. The reasoning proceeds really upon the same lines as that in *Rylands* v. *Fletcher* (3), and, I think, fails to apply to this case on the same grounds. It may be that where a heavy object is suspended over a highway, and must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises, such person is bound absolutely to maintain the attachments. But a branch of a tree is not kept from falling by artificial attachments to be maintained by man, but by the natural processes which develop the tree, and it is only when accident or decay interferes that human intervention is required. I see no ground for holding that the owner is to become an insurer of nature, or that default is to be imputed to him until it appears, or would appear upon proper inspection, that nature can no longer be relied upon.

For these reasons I am of opinion that this appeal must be allowed, with costs.

WRIGHT J. This is an appeal from a judgment of the county court judge at Brighton, who has held the defendant

(1) [1911] 2 K. B. 633. (2) 1 Q. B. D. 314.
(3) L. R. 3 H. L. 330.

liable for damages suffered by the plaintiff's motor coach, which was injured by the falling upon it of a branch of a beech tree growing in Buckingham Park, Old Shoreham, of which the defendant is owner and occupier. This branch, which overhung the highway, suddenly broke off and fell on the motor coach as it was passing along the highway and damaged it.

The judge has found that the branch, which grew out at a height of 30 feet from the ground and was 20 to 25 feet long and 10 inches in diameter, had at some time developed a crack at the place about 15 feet from the trunk where it broke off, but that the defect was not observable by any reasonably careful inspection. The tree was about eighty years old, and presented every appearance of health, and had been the subject of careful inspection not long previously. The judge found that the defect was latent, and that the defendant had no knowledge of it and that knowledge could not be imputed to him. The claim, so far as it was based on negligence, therefore failed, as no want of care was proved.

The judge however decided in favour of the plaintiff on the grounds of (1.) nuisance, and (2.) on the principle of *Rylands* v. *Fletcher*. (1) In my opinion the judgment cannot be supported on either ground.

The bough by reason of its height from the ground was clearly not a nuisance in the sense that it obstructed the highway to members of the public lawfully passing and repassing. I think the judge does not decide that it was a nuisance merely because it overhung the road, though it was in argument sought to support his judgment on that ground. Mr. Beechman in his able argument for the plaintiff cited for this contention the following passage from Pollock on Torts, 12th ed., p. 411: "It is an actionable nuisance if a tree growing on my land overhangs the public road or my neighbour's land." The authority quoted by the learned author for the former branch of this proposition is the following dictum of Best J. in *Earl of Lonsdale* v. *Nelson* (2):

(1) L. R. 3 H. L. 330. (2) 2 B. & C. 302, 311.

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"There is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it." So far as concerns branches overhanging the private land of an adjoining owner the law is quite clear, and has been fully discussed in *Lemmon* v. *Webb* (1), where the dictum of Best J. was applied, but only to the case of branches overhanging a neighbour's land. Such a case is obviously quite different in principle from that of a highway, because there is in the former case an interference with the neighbour's absolute right to the uninterrupted enjoyment of his own land. But if the overhanging branch is at such a height above the highway as not to obstruct free passage no right is interfered with. I have not been able to find the decided cases to which Best J. seems to refer, but I note a quotation in the judgment of Kay L.J. in *Lemmon* v. *Webb* (2), from Brooke's Abr. "Nusans": "per Keble, that a man is not bound to lop a tree which incumbers a roadway, 'chimin,' and, therefore, it should seem that another" (that is, I suppose, some one not the owner of the tree) "may do it." I think both Keble (the counsel) and Best J. must be contemplating branches which obstructed the highway or were an obvious source of danger. On the other hand, I find the great authority of Blackburn J., who, in *Tarry* v. *Ashton* (3), a case to which I shall refer later, said in reference to a lamp suspended over the highway: "It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become

(1) [1894] 3 Ch. 1; [1895] A. C. 1. (2) [1894] 3 Ch. 1, 19.
(3) 1 Q. B. D. 314, 318.

dangerous if allowed to get out of repair. It is therefore not a nuisance of itself." This is certainly good sense when it is remembered how many articles are suspended from buildings in our streets, and if it is true of artificial objects it must be a fortiori true of natural growing things like branches of trees. If the overhanging branch was in itself a nuisance from the mere fact that it overhung the public highway it was a public nuisance, which might be the subject of an indictment. On this assumption it is startling to contemplate how many such public nuisances add amenity and beauty to our roads. In my opinion the overhanging branch was not per se a nuisance.

Then it is contended that it became a nuisance when at some unknown time, some years ago, the latent defect began and gradually developed by natural causes and without any human agency or any indication to human eyes. In that case I think the defendant is not liable, because of the principles laid down in *Barker* v. *Herbert*. (1) The nuisance in that case was caused by the act of a trespasser, but I think the same principle applies to a nuisance (in this case the latent crack in the branch with the resulting risk that some day it would fall) caused by a secret and unobservable operation of nature. Fletcher Moulton L.J. thus states the law (2): "In my opinion the law in such a case as the present is that the possessor of land adjoining a highway may not cause his premises to be a nuisance to the highway, and he will be responsible in this respect for the acts of his agents or servants. . . . . In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognises that there may be a continuance by him of the nuisance. In that case the gravamen is the continuance of the nuisance, and not the original causing of it. . . . . He cannot be said to have permitted the continuance of that which was not caused by him, and of which he had no

(1) [1911] 2 K. B. 633. (2) Ibid. 642.

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knowledge." The Lord Justice explains that by knowledge he means actual or imputed knowledge. If the above principles are applied, as I think they should be applied, to the present case, it follows that the defendant cannot be held liable on the facts found by the judge on the ground of nuisance.

Nor can the defendant be held liable, in my opinion, on the principle of *Rylands* v. *Fletcher*. (1) That principle has often been discussed, applied and distinguished, and I need not refer to the many authorities. I may apply to the facts of this case the language of Fletcher Moulton L.J. in the judgment just referred to (2): "This is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous in itself." I think this expresses the true principle of *Rylands* v. *Fletcher*. (1) I do not think it material to consider whether the beech was originally planted (as most boundary trees would be) or whether it grew casually. Such a tree is a usual and normal incident of the English country; it develops by slow natural growth, its branches are not likely to cause danger, even if permitted to expand outwards over the highway. Such a tree cannot be compared to a tiger, a spreading fire, or a reservoir in which a huge weight of water is artificially accumulated to be kept in by dams, or noxious fumes or sewage. I see no reason whatever to apply the principle of *Rylands* v. *Fletcher* (1) to the case now under consideration. No doubt under that principle the landowner becomes an insurer, and absolutely responsible for the safe keeping of the dangerous thing. The principle is as stated by Blackburn J. in *Fletcher* v. *Rylands* (3): "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." A qualification of that general rule is expressed in the words of

(1) L. R. 3 H. L. 330. (2) [1911] 2 K. B. 633, 642.
(3) (1866) L. R. 1 Ex. 265, 279.

Wright J. in *Blake* v. *Woolf* (1), cited with approval by the Privy Council in *Rickards* v. *Lothian* (2) (where the principle is fully discussed): "That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him." I think these words are applicable to the present case. If it were necessary to consider further I should also be inclined to think that having regard to the nature and origin of the latent defect in the bough which caused it to break and fall, the case could also be deemed to fall within the principle of vis major, which was recognized in *Nichols* v. *Marsland*. (3)

I ought in conclusion to refer to a contention on behalf of the plaintiff based on the judgments of Lush and Quain JJ. in *Tarry* v. *Ashton*. (4) In that case a large lamp, weighing forty or fifty pounds, suspended in front of the defendant's house in the Strand, suddenly fell and injured a passer by. It fell owing to a defect, which was not observed because of the negligence of the defendant's servant employed to inspect it. On that ground of negligence the plaintiff was entitled to judgment, but Lush and Quain JJ. appear to have held that there was an absolute duty on the defendant to keep the lamp in a safe state of repair. That case is clearly distinguishable from the present case, because the defect in the lamp was not latent and the lamp was a heavy artificial object, which necessarily required and was capable of inspection. But Blackburn J. was inclined to the opinion, that for a latent defect or something done to the premises without the knowledge of the occupier, the occupier would not be liable. The same view was expressed in the dissenting judgment of Moore J. in the Irish case of *Mullan* v. *Forrester* (5), whose view was that the liability of the occupier depended on knowledge where a wall blew down through defects and killed certain passers by. I do not think either

(1) [1898] 2 Q. B. 426, 428.
(2) [1913] A. C. 263, 280.
(3) (1876) 2 Ex. D. 1.
(4) 1 Q. B. D. 314.
(5) [1921] 2 I. R. 412.

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of these cases affords any assistance to the decision of the present case, but, if I may respectfully say so, I prefer the reasoning of Blackburn and Moore JJ.

For the above reasons I think the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *F. H. Carpenter, Brighton.*

Solicitors for defendant: *Adkin & Son, for F. H. Nye, Brighton.*

J. S. H.

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April 14, 15, 26.

VERGOTTIS *v.* WILLIAM CORY AND SON, LIMITED.

[1924. V. 877.]

Shipping—Charterparty—Detention—Obligation by Shipper to provide Cargo—Congestion at Port of Loading—Special Regulations of Dock Authority—Implied Terms in Charterparty—Charterers to assist Ship to get into Dock—Failure of Charterers to comply with Special Regulations—Liability for Damages.

In February, 1923, the defendants purchased a quantity of coal from a colliery for shipment at Barry. It was the duty of the vendors to send the coal to Barry and load the steamship. On March 26 the defendants chartered the plaintiff's s.s. *Panaghis Vergottis* to load a full and complete cargo of coal. The cargo was to be loaded in 144 running, but the vessel could be and was in fact loaded in thirty-six running hours. The defendants nominated the vessel to the sellers on March 27 on account of their purchase. The vessel was ordered to Barry Docks to load, and she arrived in Barry Roads on April 10. Under the charterparty she did not become an arrived ship until she got into the dock. In ordinary times steamers are allowed to enter Barry Dock upon arrival, but no vessel is ordered to a tip unless in the opinion of the dock authority there is sufficient coal in hand to ensure continuous loading. This would generally mean about one-third of her cargo. It is not usual in Barry Dock to have coal in readiness at the dock in large quantities before the ship for which it is intended arrives in dock or at the tip. It would be impossible to store in the sidings in advance the whole cargo of each ship before it arrived in the dock or at the tip. Coal can be brought from many collieries down to the dock in a few hours. But not infrequently Barry Dock is congested with vessels loaded and waiting to be loaded. In those times the practice of the dock authority is, as the defendants knew, to require an emergency stemming note to be signed by the master of the steamship and the shipper. Before the dock authority would accept the shipper's signature they had to be satisfied that there was then sufficient coal in hand to ensure continuous

loading. When the *Panaghis Vergottis* arrived in Barry Roads on April 10, Barry Dock was crowded with vessels loading and waiting to be loaded. The master of the *Panaghis Vergottis* signed the emergency stemming note on April 11, and the agent of the colliery was willing to sign it on April 12; but as he could not satisfy the dock authority that he had any coal for the vessel actually in hand he was not allowed to sign it, and the *Panaghis Vergottis* was not allowed to enter the dock, and so lost her turn. She was not admitted to the dock till April 19. The plaintiff claimed damages for the detention of the ship between April 11 and 19 on the ground that the defendants had failed to comply with their absolute obligation as charterers to provide a cargo, and secondly that the defendants had committed a breach of an implied term of the charterparty to do what was required of the ship by the practice of the port to enable the ship to enter the dock and become an arrived ship:—

Held, that the defendants' failure to provide a cargo by the time the *Panaghis Vergottis* arrived in Barry Roads did not constitute a breach by them of their absolute duty to provide a cargo, as it was necessary for a ship to become an arrived ship before the shipper's duty to provide a cargo arose, and therefore the defendants would have complied with their obligation if after the ship arrived in the dock they had provided a cargo in sufficient time to enable them to finish the loading in the lay days.

Held, further, that inasmuch as the defendants knew that periods of congestion occurred at Barry, and that the dock authority had in such times to take special measures to ensure the prompt loading of ships and the rapid clearing of their docks, which might involve shippers being called upon to comply with requirements beyond those which they had ordinarily to observe, there was an implied term in the charterparty that the defendants would do whatever was reasonable in order to enable the plaintiff's ship to enter the dock and become an arrived ship, and that in refusing to assist the plaintiff's ship to get into dock by complying with the dock authority's requirements to have at least one-third of the vessel's cargo ready the defendants had broken their contract and were liable in damages.

ACTION tried before Greer J.

The plaintiff, who was the owner of the steamship *Panaghis Vergottis*, claimed to recover from the defendants, who were the charterers of the steamship, damages for the detention of his ship at Barry in April, 1923.

The following statement of facts is taken from the judgment:

"In February, 1923, the defendants agreed to buy from Messrs. Thomas Davey, Ld., the sales agents of the Cambrian Mines, 1800 to 2000 tons of Cambrian Navigation small coal for shipment by a steamship expected ready to load in March at Barry. It was the duty of the vendors under this contract

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to send the coal to Barry and load the steamship when named by the purchasers.

On March 26 the defendants chartered the *Panaghis Vergottis* 'to proceed to Cardiff, Penarth, Barry or Newport, and there load, always afloat in the customary manner, from the charterers a full and complete cargo of nominated coal in such dock as may be ordered by them not exceeding 2700 tons, nor less than 2400 tons.'

By clause 3 of the charterparty the cargo was to be loaded in colliery scale running hours. Calculated by hours as applied to the cargo of this vessel colliery scale meant 144 running hours. This was very much in excess of the time required in the ordinary course for loading the vessel. She could be, and was in fact, loaded in thirty-six running hours.

On March 27 the defendants nominated this vessel to their sellers 'expected ready 9th/10th April with colliery scale hours for 24/2700 tons of Cambrian small steam coal' on account of their purchase. Messrs. Davey accepted the nomination, and on defendants' instructions on April 7 ordered the vessel to Barry Dock to load her cargo under the charterparty. The steamer arrived in Barry Roads on the morning of April 10.

In ordinary times steamers are allowed to enter the dock upon arrival. When they are in the dock their admission to a tip, and the conditions on which they are allowed to be loaded, are provided for by printed and published regulations. One of these regulations provides that no vessel will be ordered to a tip unless in the judgment of the shipping superintendent there is sufficient coal in hand to ensure continuous loading. It is not usual in Barry Dock to have coal in readiness at the dock in large quantities before the ship for which it is intended arrives in dock or at the tip. A considerable number of the collieries supplying steam coal are only a short distance from the dock, and a train load of coal can be brought down in a few hours. The usual practice is for the colliery companies to send their output down to the docks without allocating it to any of the ships for which it is intended. It

is left to their agents, on the instructions of the merchants who have bought the coal for shipment, to allocate the coal as it arrives. It would be quite impossible to store in the sidings in advance the whole cargo of each ship on or before the day of arrival of the ship in the dock or at the tip. The business of loading ships could not be carried out at Barry if each shipper was obliged to have at the dock or in the port the whole of the coal required for each ship. In ordinary times when he wants to start loading a shipper must, by the regulations, have sufficient cargo there to ensure continuous loading. There is no absolute rule as to what proportion the shipper must have before the ship is allowed to go to the tip. The evidence differed as to what was usually required. The conclusion left in my mind is that a ship would generally be allowed to go to the tip if she had one-third of her cargo ready to load. In the case of the *Panaghis Vergottis* this would mean something between 800 and 900 tons. It follows that unless there is an absolute duty on the charterers to have the whole of her cargo ready in the loading port when the chartered ship arrives, the charterers could have complied with their obligations in this case by leaving the vessel without any coal for a few days after her arrival, then getting, say, 850 tons down, commencing to load after obtaining a tip, and finishing within 144 hours from the time of the ship's arrival.

The times, however, were not normal. The Barry Dock was crowded with vessels loading and waiting to be loaded. This was not an infrequent state of things, and it must have been contemplated by the shipowner and the charterers as a state of things that might easily happen. In times of congestion the practice of the dock authority is to require what was called at the trial a special emergency stemming note to be signed by the captain and the shipper. This note reads as follows. It first contains a statement to be signed by the master: 'I declare that the s.s. (blank) now lying in Barry Roads is in every respect ready to receive her cargo of coal, and that I am ready to proceed with her loading immediately upon admission to dock'; and then follows a note to be

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signed by the firm loading her, which represents the charterers for this purpose: 'Please stem the s.s. (blank) (so many) tons net register to load cargo and/or bunkers on account of (blank). Please admit vessel into dock and arrange to berth her at the earliest possible moment.' Then follow 'Particulars of cargo and/or bunkers.' Then: 'The vessel will be ready to commence at (blank time); wharfage payable by (blank); tolls payable by (blank); mixing charges payable by (blank). Signed on behalf of' the loading firm; and a note at the end: 'This stemming note is for use only in cases where it is impossible to admit vessel into dock when they arrive in the Roads, and the Barry Company do not accept any responsibility or liability of any kind whatever, owing to the temporary suspension of the ordinary custom. The acceptance by the shipper of this note is to be accepted as a contract to this effect.'

Before the dock official will accept the shippers' signature to the stemming note he must be satisfied that there is then sufficient in hand to ensure continuous loading. One of the clerks who attend to these matters on behalf of the dock authority, but subject to appeal to those in authority over him, said that he thought about two-thirds of the cargo would be required to be at the dock before an emergency stemming note would be accepted. I think this was an over-estimate, and I conclude from the evidence of Mr. Boaler that a stemming note would have been accepted from shippers in the position of the defendants if they had ready at the dock one-third of the coal to be shipped.

On April 11 the master signed the emergency stemming note. Mr. Boaler, who represented Messrs. Davey with regard to the loading of the *Panaghis Vergottis*, stated that he was aware that in times of congestion a vessel is not allowed to come in unless there is sufficient coal to load her. By this he meant coal allocated to her on the dock side within reach of the tip sufficient to ensure the loading beginning and going on, and that about one-third would be sufficient for a steamer of the size of the *Panaghis Vergottis*.

There was in fact no coal ready for the vessel until April 16, and then only 450 tons of Ferndale small coal, which the defendants accepted in place of Cambrian coal. Mr. Boaler was willing to sign the note on April 12, in the expectation that he might be able, out of the stream of coal coming into the dock from the Cambrian Mines, to allocate sufficient Cambrian small to the plaintiff's ship to load her within the lay days, but as he could not satisfy Mr. Thomas, the railway company's clerk, that he had any actually in hand, he was not allowed to sign the stemming note, and the *Panaghis Vergottis* was not allowed to enter the dock. The result of this was that a number of other vessels were allowed in before the *Panaghis Vergottis*, though they had arrived in the Roads after her. She lost her turn, and was not admitted to the dock until April 19, when the congestion had somewhat abated.

Under the charterparty she was not an arrived ship until she got into the dock. Her lay days began then and not before. The plaintiff could not use the delay outside the dock for the purpose of calculating the amount of the demurrage to which he was entitled. He claimed damages for the detention between April 11 and 19, on the ground that the defendants' failure to have the cargo ready at the dock side when the vessel arrived outside the dock, and their failure to sign the emergency note, constituted breaches of an implied term in the charterparty."

Clement Davies K.C. and *Sir Robert Aske* for the plaintiff. There was an implied term that the charterers should make arrangements whereby the plaintiff's ship should get into dock immediately upon her arrival or within a reasonable time thereafter. There was a breach by the charterers of that implied term for which they are liable in damages. *Little* v. *Stevenson & Co.* (1), which will be relied upon by the defendants, was considered in *Ardan Steamship Co.* v. *Andrew Weir & Co.* (2), which shows that there is an obligation on charterers not to prevent a ship becoming an arrived ship,

(1) [1896] A. C. 108. (2) [1905] A. C. 501.

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and if it is necessary for the charterer to do some act to enable the ship to get into dock he must do that act. The charterers in this case should have had the cargo ready when the ship arrived in Barry Roads. They failed, knowing the situation, to take steps which would have enabled the vessel to enter the dock which they had nominated and so become an arrived ship.

Langton K.C. and *Wilfrid Lewis* for the defendants. *Little* v. *Stevenson & Co.* (1) shows that there is no obligation on charterers to have cargo ready, or even to provide for special emergencies, until the ship is an arrived ship. The plaintiff is not saying in this case that the defendants shall do the ordinary thing with regard to providing the cargo, but that they shall do something that is not usual in order to meet an exceptional case. It is true that the defendants did not have a cargo available for this ship, but it is not the custom at Barry Dock to allocate coal to a particular ship, the defendants had a stream of coal coming from the collieries to the docks, and the plaintiff's ship would be loaded in the ordinary course from that stream of coal. The defendants' contract was to load the plaintiff's ship when she was in the dock, and not, as the plaintiff contends, to have the cargo ready at the dock before she got into dock. Lord Davey in *Ardan Steamship Co.* v. *Andrew Weir & Co.* (2) referred to *Little* v. *Stevenson & Co.* (1) as laying down that "the shipper's or charterer's obligation is only to have his cargo ready when the ship is ready to receive it in ordinary course, and that he is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either of the parties." It was held in *Whimster & Co.* v. *T. P. Rose Richards, Ld.* (3), in a similar case to the present that the charterers were only liable for damages calculated from January 23, the date when they countersigned the stemming note, to January 27, the date when the ship got into Barry Dock, and not from January 17, the date when the vessel arrived in Barry Roads.

(1) [1896] A. C. 108. (2) [1905] A. C. 501, 512.
(3) (1920) 5 Ll. L. Rep. 350.

Clement Davies K.C. in reply. The point now raised by the defendants could have been raised in *Whimster & Co.* v. *T. P. Rose Richards, Ld.* (1), as a complete answer, but it was admitted that there was an obligation on the charterers outside the terms of the contract, and the sole question was whether it had been fulfilled. The general rule was laid down by Lord Blackburn in *Mackay* v. *Dick* (2), "that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." The rule is thus stated in Carver's Carriage by Sea, 7th ed., § 254 (*a*): "Generally speaking, where vessels are not allowed to go into berth until their cargoes are ready for them in such a position as the custom or rule of the place requires, the charterer is in default if, by not having his cargo in readiness, he prevents the ship from getting a berth in the agreed, or usual, course. And he will be liable to pay for the detention, although it may be agreed that the lay days are to count from the time when the vessel is in berth," and *Ardan Steamship Co.* v. *Andrew Weir & Co.* (3) and *Lilly & Co.* v. *Stevenson & Co.* (4) are cited as authorities for the proposition: see also Scrutton on Charterparties, 12th ed., art. 42, p. 146, which is to the same effect. In the present case the vessel was prevented from getting her berth in the usual course because the defendants had failed to have the coal ready for her. In *Little* v. *Stevenson & Co.* (5) it was held that the charterers were not liable, because what happened was a contingency or fortuitous circumstance not contemplated by either of the parties. But Lord Herschell in that case said (6) that he did not deny that a shipper "is bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the earliest period that is reasonably possible; and it may be

(1) (1920) 5 Ll. L. Rep. 350.
(2) (1881) 6 App. Cas. 251, 263.
(3) [1905] A. C. 501.
(4) (1895) 22 R. 278.
(5) [1896] A. C. 108.
(6) [1896] A. C. 119.

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that in certain circumstances, owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there to enable the vessel to obtain an earlier berthing than would otherwise have been obtained." In *Krog & Co.* v. *Burns* (1) the Court distinguished the decision in *Little* v. *Stevenson* (2), and held that the circumstances brought the case within the terms of Lord Herschell's dictum in that case (3), and that the charterers should have had a cargo of coal ready to enable the ship to occupy a berth which became vacant out of her turn.

Wilfrid Lewis replied upon the cases.

Cur. adv. vult.

April 26. GREER J. read the following judgment: In this case the plaintiff, who was and is the owner of the s.s. *Panaghis Vergottis*, claimed against the defendants, the charterers by charterparty dated March 26, 1923, demurrage and damages for detention of his ship at Barry in April, 1923. The claim for demurrage was admitted by the defence, and the amount claimed was paid into court. The amount of damages, if any, payable for detention was agreed at the trial at the sum of 250*l*. The only question remaining for me to decide is whether the plaintiff has established his claim for damages for detention.

I find the material facts as follows. [His Lordship then read the facts set out above and continued:] The claim was put in two ways by the plaintiff's counsel: (1.) It was argued that the defendants had failed to comply with the absolute obligation to which a charterer is always subject, to provide a cargo. (2.) It was put as a breach of an implied undertaking to do what was required on the part of the shippers by the practice of the port to enable the plaintiff's ship to enter the dock and so become an arrived ship. On

(1) (1903) 5 F. 1189. (2) [1896] A. C. 108.
(3) [1896] A. C. 119.

the first point counsel chiefly relied on the *Ardan Steamship Co.* v. *Andrew Weir & Co.* (1) and *Krog & Co.* v. *Burns.* (2)

It has been frequently laid down in both Scottish and English cases that a shipper's obligations with regard to the loading of the cargo are twofold: (1.) an absolute obligation to provide the cargo at the port of loading, and (2.) an obligation to do his part of the loading in the agreed time, i.e., the fixed lay days, or a reasonable time, as the case may be: see *Grant & Co.* v. *Coverdale, Todd & Co.* (3); *Postlethwaite* v. *Freeland* (4), per Lord Blackburn; *Gardiner* v. *Macfarlane & Co.* (5) The duty to provide the agreed cargo is sometimes stated as if it meant that when the vessel arrives the shipper is bound to have his cargo, that is the whole of it, at the loading port. This is not, in my opinion, an accurate way of stating the primary obligation of the charterer. There are, of course, many ports in the world where the shipper would be unable to load the ship in the lay days, or within a reasonable time thereafter, if he had not brought the whole of the cargo to the port of loading when the ship arrived, and in these cases it may be right to say that the charterers' duty is to have the cargo at the loading port when the ship arrives. In the *Ardan Steamship Co.* v. *Andrew Weir & Co.* (6) Lord Halsbury states the duty as an absolute duty "to supply" the cargo, or, in another part of his judgment, "to provide the cargo." This cannot, and does not, in my judgment, mean that he must always have the whole of the cargo at the port when the ship arrives. Lord Herschell said in *Little* v. *Stevenson & Co.* (7): "It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be in short, that was an obligation

(1) [1905] A. C. 501.
(2) 5 F. 1189.
(3) (1884) 9 App. Cas. 470.
(4) (1880) 5 App. Cas. 599, 619.
(5) (1893) 20 R. 414.
(6) [1905] A. C. 501, 510.
(7) [1896] A. C. 118.

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always resting upon the shipper." The House of Lords in that case held that the obligation was not as wide as that. In my judgment the obligation to provide the cargo would be fulfilled if the shipper made and carried out arrangements for the delivery of the cargo at the ship's side in time to load her in accordance with the terms of the charterparty. Further, it is difficult to understand how there can be any duty to provide the cargo before the ship completes her inward journey and becomes an arrived ship. It seems to me that it must be the duty of the ship to become an arrived ship before the shippers' duty to provide the cargo can arise. The promises on the part of the shipowner to present his vessel in the agreed place, and on the part of the charterer to there provide her with the agreed cargo and load it in the agreed time, are mutual interdependent promises. And until the ship has performed its part by arriving at the agreed place, the shipowner cannot complain that the cargo has not been provided. Unless the decision of the House of Lords in the *Ardan Steamship Co.* v. *Andrew Weir & Co.* (1) compels me to decide otherwise, I should hold in the present case that the defendants' failure to provide a cargo by the time the ship arrived in the roads did not constitute a breach by them of the absolute duty to provide a cargo. They could, in my judgment, have complied with their obligation if, after the vessel arrived in the dock, they had provided a cargo in sufficient time to enable them to finish the loading in the lay days. At first sight the decision of the House of Lords in the *Ardan* case (1) seems to establish that a shipowner can complain of the non-provision of a cargo before the ship has arrived at her loading place. The headnote of the case accurately states the facts and the decision. It looks as if the House of Lords had decided that the duty to provide a cargo arises before the vessel is an arrived ship. I do not think the decision necessarily involves such a doctrine. The facts proved in that case were very special. No distinction seems to have been suggested in the argument between the damages for delay before the vessel got to her berth and

(1) [1905] A. C. 501.

the damages that arose subsequently. And at the time the vessel was ready to go to the tip the charterers' failure to make proper provision for a cargo completely demonstrated that they had disabled themselves from performing their contract to have a cargo ready when the vessel should get to her berth. However this may be, the facts were very different from those in the present case, and if the plaintiff had no other ground on which he could support his claim than the failure to provide a cargo between April 11 and 19, I should have hesitated to hold that his claim could succeed. I am, however, of opinion that the plaintiff is entitled to succeed on the other point argued before me.

It must have been known to the defendants, who are one of the largest shippers of coal from the ports of Barry Dock, Penarth and Cardiff, that from time to time periods of congestion occurred at Barry, and that the dock authority had to take special measures to ensure the prompt loading of ships and the rapid clearing of their dock, and that such measures might involve their being called upon to comply with requirements beyond those which they had ordinarily to observe. It is impossible to read the judgments in *Little* v. *Stevenson & Co.* (1) without seeing that if the case had been one in which the charterers had failed to have cargo ready to begin loading when the ordinary time of the plaintiff's ship came to enter the dock they would have been held liable. The decision in the case was that they were not bound to have cargo ready when a casual vacancy in the dock occurred owing to the cargo of an earlier vessel not being ready. Lord Herschell says in his judgment (2): "I do not for a moment deny that he is bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the earliest period that is reasonably possible." I think there is an implied term in the charterparty that the defendants would do whatever was reasonable in order to enable the plaintiff's ship to get into the dock and so become an arrived ship. It may be urged that it is unreasonable to require that a charterer, who, by the terms of his bargain, need only have his cargo

(1) [1896] A. C. 108. (2) [1896 A. C. 119.

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ready in time to load the ship in 144 hours after she gets into dock, should have a substantial part of his cargo ready before she gets into dock at all. But I think that shipowners and shippers of coal doing business at the South Wales ports would regard it as reasonable in times of congestion that the dock authority should require at least one-third of the vessel's cargo to be ready before she was admitted to the dock, and I think, in refusing to assist the plaintiff's ship to get into the dock by complying with the requirements of the dock authority, the charterers broke their contract, and are liable to pay the agreed damages. There will be judgment for the plaintiff for 250*l.* and costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitors for defendants: *Ingledew, Sons & Brown, for Ingledew & Sons, Cardiff.*

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April 27, 28.

WILLESDEN GUARDIANS *v.* WESTMINSTER GUARDIANS.

Poor Law—Settlement—Settlement by Residence—Irremovability—Foreigner having no Settlement—Poor Removal Act, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1—*Divided Parishes and Poor Law Amendment Act,* 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34.

A foreigner, although, as such, having no place of settlement, can acquire a status of irremovability and, consequently, a settlement by residence under the provisions of s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (as amended).

CASE stated for the opinion of the Court pursuant to the provisions of s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45).

On June 19, 1925, the respondents, the Westminster Guardians, obtained an order under the hands and seals of two justices of the peace in and for the county of London, whereby it was adjudged that the parish of Willesden in the county of Middlesex was the place of the last legal settlement

of one Lewis Samuels (aged about 68 years) a pauper then chargeable to the respondents' union and whereby the appellants, the Willesden Guardians, were ordered to receive and provide for the said pauper according to law. The appellants gave due notice of appeal against the said order to the court of quarter sessions, holden in and for the said county, and the appeal having been duly entered the following special case was stated, the parties thereto agreeing that judgment in conformity with the decision of this Court might be entered at the said quarter sessions according to the provisions of the said statute.

The case stated as follows: The said Lewis Samuels (hereinafter referred to as "the pauper") was born on January 12, 1858, in Poland, and came to England from Holland in the year 1914. He resided for about eight years prior to about October, 1924, at 145 High Road, Kilburn, in the parish of Willesden in the county of Middlesex. During the said period the pauper did not receive relief from the parish of Willesden nor was his residence otherwise of the character specified in the proviso to s. 1 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66). From October, 1924, the pauper resided at various addresses in the parish of Willesden. Such residence was not of the character aforesaid except for the period from February 21, 1925, to April 6, 1925, when the pauper was an inmate of the Park Royal Hospital in the parish of Willesden, an institution of the guardians of the parish. The pauper left the parish of Willesden and entered the Westminster Hospital on or about April 24, 1925, and remained an inmate thereof until June 3, 1925, when he became chargeable to the city of Westminster Union and was admitted to the union infirmary (St. Stephen's Hospital). On June 19, 1925, the said order of justices was obtained on behalf of the guardians of the Westminster Union adjudging the settlement of the pauper to be in the said parish of Willesden. The pauper was never possessed of any settlement unless by reason of the above facts. Notice of such order was duly given to the appellants.

The appellants contended that the pauper was not settled

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in the said parish of Willesden. The respondents contended that the pauper had acquired a settlement in the said parish. The question for the opinion of the Court was whether the pauper was settled in the said parish of Willesden or not.

Sydney Davey for the appellants. The order of the justices was wrong. The Poor Removal Act, 1846, contemplated that the pauper in respect of whom irremovability was claimed must at the time have a settlement: *Reg.* v. *Bennett.* (1) If he had not he was not irremovable by virtue of that statute, though irremovable in fact, because there was no parish to which he could be removed. That being the law up to 1876, the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), by s. 34, created a new species of settlement—namely, settlement by residence for those who had been irremovable for three years—but preserved the above distinction between irremovability by statute and irremovability in fact, and extended only to those who had resided for three years in such manner and under such circumstances in each of such years, "as would in accordance with the several statutes in that behalf render him irremovable." No statute "in that behalf" exists which renders the pauper in this case irremovable; he is merely irremovable in fact because, as a foreigner, he has no settlement, and therefore there is no parish to which he can be removed. If he took a tour of England he would always for that reason be irremovable from any parish in which he became chargeable, although otherwise removable. Consequently he never obtained a settlement in the parish of Willesden. The case of *Tewkesbury Union* v. *Birmingham Guardians* (2), in which the wife of a foreigner was held to be irremovable by reason of a year's residence by her in a parish, may seem to be against the argument for the appellants. But that case only decided that as the wife did not derive any settlement from her husband, who, as a foreigner, had none, there was nothing in the words of s. 1 of the Poor Removal Act, 1846, to prevent her attaining the status of irremovability by her residence, and the

(1) (1854) 23 L. J. (M. C.) 39. (2) [1904] 2 K. B. 395.

words of Lord Alverstone C.J. (1), "If he [the husband] had resided in the parish . . . . for twelve months . . . . [he] would then have acquired the status of irremovability," were unnecessary to the decision.

[*West Ham Union* v. *Bethnal Green Guardians* (2) and *Daventry Union* v. *Coventry Union* (3) were also referred to.]

E. J. Naldrett for the respondents. The Act of 1876, by s. 34, introduced a new species of settlement, by residence, and no limitation is placed upon the kind of person to whom it is intended to apply. Words of the widest application are used—namely, "any person"—which would include a foreigner. By s. 44: "The words herein contained"—i.e., in the Act of 1876—"shall be construed as in the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76)," and by s. 109 of the latter Act "person" is to include "any individual." The words "statutes in that behalf" in s. 34 of the Act of 1876 are applicable to the present case, because they refer to the proviso to s. 1 of the Act of 1846, which excludes certain periods from the computation of the duration of residence necessary to confer the status of irremovability, and to the provisions of s. 1 of the Poor Removal Act, 1848 (11 & 12 Vict. c. 111). These are the statutes "in that behalf" referred to in s. 34 of the Act of 1876. If that is so, then this pauper is directly within the terms of s. 34. Even assuming that *Reg.* v. *Bennett* (4) was rightly decided, its effect was destroyed by s. 34 of the Act of 1876. In *Rex* v. *Eastbourne* (*Inhabitants*) (5), which was not cited in *Reg.* v. *Bennett* (4), it was held that a foreigner could get a settlement by occupying a 10*l.* tenement for forty days.

[He was stopped.]

LORD HEWART C.J. This is a case stated by justices, and it involves an interesting question on the law of pauper settlement. I desire to say at once that the law has been very carefully and fully laid before the Court by counsel for the appellants.

(1) [1904] 2 K. B. 404.
(2) [1894] A. C. 230.
(3) [1917] 1 K. B. 289.
(4) 23 L. J. (M. C.) 39.
(5) (1803) 4 East, 103.

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The point in the case may be concisely stated. On June 19, 1925, the respondents obtained an order under the hands of two justices, whereby it was adjudged that the parish of Willesden was the place of the last legal settlement of the pauper, then chargeable to the Westminster Union, and by that order the appellants, who are the guardians of the Willesden Union, were ordered to receive and provide for the pauper. The appellants, by this case stated, challenge that position. It is not necessary to recapitulate all the facts which are found in this well stated case. It is enough to mention that the pauper was born in Poland and came to England from Holland in 1914, and that he resided for about eight years before October, 1924, in the parish of Willesden. The case finds that during that period he did not receive relief, nor was his residence otherwise of the character specified in the proviso to s. 1 of the Poor Removal Act, 1846. After that period the pauper resided at various places in the parish of Willesden, and that residence also was not of the character specified in the said proviso, except for a few months in the early part of 1925—namely, from February 21 to April 6—during which he resided as an inmate of the Park Royal Hospital in the parish of Willesden, an institution of the guardians of the parish. In these circumstances the justices came to the conclusion that the pauper was settled in the parish of Willesden. They found as a fact that he was never possessed of any settlement unless by reason of that settlement, and being alien born could not have a birth settlement in any parish in this country.

The question turns upon the true construction of certain provisions of the Poor Removal Act, 1846, and the Divided Parishes and Poor Law Amendment Act, 1876. Sect. 1 of the former Act provided that "No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for [one year] next before the application for the warrant." Then came the proviso. By that proviso the section carefully deals with various modes of residence falling within a particular category, and provides that residence of that kind is

not to be computed in making up the time of residence. That section is clearly dealing with the question of irremovability, and when the conditions therein laid down have been satisfied there enures to the person referred to a status of irremovability. In order that there may be no doubt upon that point—in order that the breadth and scope of the section may not be misinterpreted—s. 5 provides: "Provided always . . . . that no person hereby exempted from liability to be removed shall by reason of such exemption acquire any settlement in any parish." In other words there is a label put upon this Act twice over saying: "This Act is dealing not with settlement but with irremovability." So the matter stood until 1876. In 1854 the case of *Reg.* v. *Bennett* (1) was tried. It was held in that case that the Poor Removal Act, 1846, extended only to render irremovable paupers who had a known settlement. The judgments are as clear as they are concise. Lord Campbell C.J. said (2): "The object of the 11 & 12 Vict. c. 110 [the Poor Law Amendment Act, [1848], clearly is to cast on the union fund the expense of that class of persons only who are rendered irremovable by the 9 & 10 Vict. c. 66. Unless it be shown that these paupers become irremovable by virtue of that Act, no use can be made of the subsequent statute. Now, these paupers were irremovable not by virtue of that Act, but were so before it passed, on the ground that they had no settlement anywhere to which they could be removed. That being so, the cost of their relief is not cast on the common fund of the union." Coleridge J. said: "It comes to the question whether [the auditor] has rightly construed the 9 & 10 Vict. c. 66, which applies only to paupers who might have been removed to the place of their settlement, and not to paupers who have no settlement. The words must be read as if restrained to such cases." Wightman J. expressed the same view in words equally short and free from ambiguity. That case was decided seventy-two years ago, and it seems a little significant that during the three-quarters of a century which have elapsed since that time it does not appear to have been referred to.

(1) 23 L. J. (M. C.) 39. (2) Ibid. 40.

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Why is that? The answer seems to be two-fold; first, because it stated so clearly the effect of the law as it then stood, and, secondly, because the Divided Parishes and Poor Law Amendment Act, 1876, made an unmistakable change in the law, and so rendered the case obsolete. The Act of 1846 having been so clearly described as an Act dealing only with irremovability and as having no application to persons who had not acquired a settlement, the Legislature passed the Act of 1876, s. 34 of which provides in clear terms for the settlement of persons by residence, and is as follows: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein." Here there is a new type of settlement, settlement by residence, and that is acquired where any person resides in any parish for three years, provided that certain conditions are complied with—namely, that the residence in each of these years is such as would render the pauper irremovable. What is the meaning of these words? They seem clearly to be a reference back to the proviso to s. 1 of the Act of 1846, which provides that certain times are to be excluded in the computation of the period of residence necessary under the Act to confer a status of irremovability. That, it seems to me, is the clear meaning of these words. Mr. Davey has argued, with great resources of knowledge and skill, that the meaning of s. 34 is different. He says that *Reg.* v. *Bennett* (1) decided that the Act of 1846 relates entirely to the irremovability of persons who had a settlement previously, and he argues, therefore, that s. 34 can have no application to the present case, inasmuch as here, ex concessis, the pauper had no settlement before his residence in Willesden. He puts the matter in two ways. He says that when one looks for "the several statutes in that behalf" referred to in s. 34 of the Act of 1876, one either finds none at all or a statute which deals with the matter wholly in the negative sense, and excludes this kind of case from the

(1) 23 L. J. (M. C.) 39.

irremovability which it is providing in other cases. That I think is a strain upon the interpretation, the very object of s. 34 being to provide for the acquisition of settlement by residence. There seems to be a sharp contrast between this Act and s. 1 of the Act of 1846, emphasized as that section is by s. 5, which provides that the exemption of a person from liability to removal conferred by the Act shall not give him a settlement in the parish from which he is irremovable. The Act of 1846 was dealing with the irremovability of persons who had a settlement. Then the Act of 1876 enacted that henceforth there should be a settlement for persons having the marks of irremovability provided in the Act of 1846, while the fundamental necessity for an antecedent settlement disappeared. I think therefore that the justices came to a right conclusion, and the appeal fails.

AVORY J. I am of the same opinion. It is not disputed that the statute of 1876 for the first time conferred the power of acquiring a new kind of settlement—that is, by residence for three years in a particular manner and under particular circumstances in each of such years. Mr. Davey, for the appellants, has argued that that provision in the Act of 1876 has no application to any person, except one who already has a settlement in this country. I can see nothing in the statute to justify us in limiting that provision to such a person. Although everybody who is not a foreigner is supposed to have some settlement, either by birth or derivation or otherwise, cases must sometimes arise where it is impossible to ascertain the settlement of a pauper who has become chargeable. In the case, for instance, of a pauper lunatic, it may frequently be impossible to ascertain his settlement, but, if Mr. Davey is right, then, in such a case, although that person doubtless has a settlement somewhere, he could not acquire a settlement by residence under the Act of 1876, because, as Mr. Davey contends, that Act only applies to a person whose settlement is ascertained under the Act of 1846. I agree, that if the statute of 1846 stood alone for interpretation, it does apply, prima facie, only to persons

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who have a settlement to which they can be removed. The amending Act to which I drew attention during the argument, the Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), seems to make it quite clear that it contemplated removal orders being made in respect of persons who had some ascertained settlement, because it provided by ss. 1 and 2, amending the procedure, that instead of its being necessary for a copy of the examination upon which the order was made to be sent to the other side, the notice of the order of removal should be accompanied by a statement in writing setting forth the grounds of removal, including the particulars of the settlement or settlements relied upon in support thereof. But we are not called upon to construe the Act of 1846 by itself. What we are called upon to construe is s. 34 of the Act of 1876, which provides for the acquisition of a settlement by residence for three years in a particular manner and under particular circumstances in each of such years, and I entertain no doubt that the words "in such manner and under such circumstances" are satisfied by looking at the kind of residence which is contemplated in the Act of 1846. The provision that the time during which a person shall be a prisoner in a prison, or shall be residing as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, answers the description of the "manner" in which a person may be residing; and the proviso that the time during which a person is receiving relief from any parish, or being wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, clearly applies to the "circumstances" under which a person may be residing. Consequently it appears to me that both these conditions, the manner in which and the circumstances under which the person is residing, are satisfied by reference to the proviso to s. 1 of the Act of 1846, and, as soon as it is ascertained that a person has resided in such a manner and under such circumstances that he does not come within any of the terms of the proviso, then that residence, if it lasts three years and is completed in each of these years in such manner and under such circumstances, constitutes the

acquisition of a settlement by residence within the meaning of s. 34. For these reasons I agree that the appeal should be dismissed.

SHEARMAN J. I agree. The only question in this case is what is the fair meaning of these words in s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein." When one looks at the earlier statute of 1846, which created a status of irremovability, I do not doubt that the decision in *Reg.* v. *Bennett* (1) quite properly decided that it could only be enforced when a man had already got a settlement. I can quite see that Mr. Davey's argument is plausible. It is conceivable that the construction for which he contends does come within the words of the statute, but I think that another and much more reasonable construction can be put upon these words in the statute of 1876. That was a statute conferring a new status of settlement by residence for a certain time, and I feel confident that it was intended as a simple and general enactment, not confined to certain limited classes. The opening words that we have to construe are extremely wide: "Where any person shall have resided for the term of three years in any parish," and, without the adverbial language, the end of the sentence is "he shall be deemed to be settled therein"; that is to say, three years' residence shall entitle him to a settlement. Then the qualifications are these: "In such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable." I do not doubt that when the Act mentions a term of three years, which is to confer a settlement by residence, "in such manner and under such circumstances," it means no more than "without any of those interruptions in any one of the three years which would

(1) 23 L. J. (M. C.) 39.

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prevent irremovability under the earlier statutes." In my view that is the true and better construction of this clause, and I think the justices were right.

Appeal dismissed.

Solicitors for appellants: *Pierron & Morley.*

Solicitors for respondents: *Capron & Co.*

W. L. L. B.

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April 29, 30.

COLCHESTER *v.* PECK.

Bastardy—Adjudication of Paternity and Order for weekly Payment—Application on fresh Evidence to revoke whole Order—Fresh Evidence as to Paternity only—"Order . . . . for the periodical payment of money"—"Fresh evidence"—Criminal Justice Administration Act, 1914 (4 *& 5 Geo. 5, c.* 58), *s.* 30, *sub-s.* 3.

On the application of the respondent, justices made an order in bastardy adjudging that the appellant was the father of her illegitimate child, and ordered him to make her a periodical payment. On a subsequent application by the appellant under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, which gives a court of summary jurisdiction power, on fresh evidence, to revoke an "order . . . . for the periodical payment of money," to revoke the whole order, he tendered fresh evidence, which went only to show that he was not the father of the child. The justices refused to hear it, holding that they had no power to deal with that part of the order which adjudged the paternity:—

Held, that the justices were right.

Held, also (by Avory and Shearman JJ.), that there being nothing to show that the evidence tendered was of facts which had occurred since the original hearing, or had come to the knowledge of the appellant since the hearing, that evidence was not "fresh evidence" within the meaning of s. 30, sub-s. 3, of the Act of 1914.

CASE stated by Ipswich justices.

At a court of summary jurisdiction sitting at Ipswich a complaint was preferred by Rachel Vivien Peck (called herein "the respondent") against Charles Herbert Colchester (called herein "the appellant"), for that he was the father of her bastard child born on December 21, 1924, and on July 2, 1925, the justices so adjudged, and ordered the appellant to pay the respondent 10*s.* per week until the child

was sixteen years of age. On November 30, 1925, the appellant applied to the justices under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58) (1), to revoke the said order on the ground that he had in his possession fresh evidence, which he tendered. The evidence was tendered only to rebut the adjudication as to the paternity. The justices refused to hear the evidence on the ground that they had no power to deal with that part of the order which adjudged the paternity, but on the application of the appellant stated this case. The case set out in detail the evidence tendered, which purported to show that on the material dates alleged by the respondent the appellant was elsewhere, and therefore could not be the father of the respondent's child.

Gerald Howard (*Gerald Dodson* with him) for the appellant. The justices had power to revoke the whole order. Sect. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, speaks of "any order," which must mean the order in its entirety, and gives power to revoke it.

[LORD HEWART C.J. The order consists of two parts: (1.) a declaration as to the paternity; (2.) a direction for the payment of money. Can you, under pretext of getting rid of the second part, get rid of the whole order?]

The section does not distinguish between these parts, but speaks of "the order." In *Timmins* v. *Timmins* (2) where an order under ss. 4 and 5 of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), had been made: (*a*) that the wife be no longer bound to cohabit; (*b*) giving legal custody of the child to the mother; and (*c*) ordering a weekly payment by the husband, it was held that the justices could under s. 7 discharge the order in its entirety on fresh evidence as to matters dealt with in one part

(1) Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 30, sub-s. 3: "Any order made either before or after the commencement of this Act by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the Court, be revoked, revived, or varied by a subsequent order."

(2) [1919] P. 75.

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of the order only. The provisions of s. 37, sub-s. 2, of the Act of 1914, giving an appeal to quarter sessions against a revocation of an order in bastardy, seem to support this argument.

[*Grocock* v. *Grocock* (1); *Davies* v. *Evans* (2); and *Dodd* v. *Dodd* (3) were also referred to.]

Hugh Goitein for the respondent. The justices had no power to set aside the whole order, because the terms of s. 30, sub-s. 3, of the Act of 1914, are not sufficiently wide, and refer only to the order for the periodical payment of money. The order is not divided into two orders, but contains: (1.) an adjudication, and (2.) an order, and it is the latter part only which can be revoked. If the appellant is right it is difficult to interpret the word "varied" in the sub-section as applicable to the first part. The judgment as to paternity is final, and determines the status of the child: *In re Macartney* (4), where Astbury J. said: "The declaration as to paternity determines the status of the child and is clearly in rem." There the declaration was by a Maltese Court, but the principle is the same. But the order as to payment is not final, and it is that part only which can be dealt with on fresh evidence.

LORD HEWART C.J. This is a case stated by justices, and if I may say so, it has been extremely well argued on both sides. It raises an interesting question under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, which provides: [His Lordship read the sub-section. (5)] The contention on the part of the appellant is that an order in bastardy is an order for the periodical payment of money within that sub-section, and that after an order in bastardy had been made against him he was entitled to come again to the justices and ask them to revoke the whole of that order, upon the ground, as he alleged, that there was fresh evidence to show that in truth and in fact he was not the father of the child. The justices came to the conclusion

(1) [1920] 1 K. B. 1, 12.
(2) (1882) 9 Q. B. D. 238.
(3) [1920] 1 K. B. 71.
(4) [1921] 1 Ch. 522, 532.
(5) See note (1) ante, p. 367.

that the evidence tendered was entirely in rebuttal of the paternity, and that, consequently, they could not hear it, nor could they, upon any such evidence, deal with the order which had been made. The question therefore is whether it is true to say that the whole of a bastardy order is an order for the periodical payment of money. It is a little important to see what the nature and form of a bastardy order is. The words of s. 4 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), seem clearly to point a contrast between two different matters. It is provided by that section that after the birth of the bastard child and after other conditions have been fulfilled, the justices shall hear the evidence of the woman and of such other witnesses as she may produce, and also evidence on behalf of the alleged father, and that if the mother's evidence be corroborated they may adjudge the man to be the father. That is the first part of the order. That is logically and chronologically the first part of the order. Then comes the second part, which is not expressed as being obligatory. It enacts that the justices may also, if they see fit, proceed to make an order on the putative father for the payment to the mother of a sum of money weekly. That language seems clearly to involve the conclusion that although an order made under s. 4 of the Act of 1872 may well contain, and in practice no doubt usually does contain, an order for the periodical payment of money, that is not the essence of the order. The essence is the adjudication of the paternity, while the accidental part, the payment of money, depends on the discretion of the justices. Two other matters seem to strengthen this view. Sect. 30, sub-s. 3, of the Act of 1914 says that the order may be "revoked, revived, or varied." What is variation as distinguished from revocation or revival? It is obvious that variation is easily applicable to that part of the order which directs the payment of money, but it is difficult to see how it is applicable to that part which relates to the paternity, unless, as is contended, variation meant revocation, and if that were so the same thing would be said twice. More than that, the order for payment was sought to be supported

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by reference to the provisions of the Summary Jurisdiction (Married Women) Act, 1895. With all respect to the able argument on that point, it seems to me that the provisions of that Act are indeed a commentary on s. 30, sub-s. 3, of the Act of 1914, but the effect of the comparison is to exhibit a contrast, not a resemblance. Sect. 5 of the Act of 1895 sets out the various kinds of order which justices may make—namely, orders containing all or any of a whole series of provisions, some relating to cohabitation, some to the legal custody of children, some to the periodical payment of money, and so forth, and it is after all these various kinds of orders have been enumerated that s. 7 goes on to employ the comprehensive words it does employ. Sect. 7 says: "A court of summary jurisdiction . . . . [where] any order under this Act . . . . has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence . . . . at any time, alter, vary, or discharge any such order, and may upon any such application . . . . increase or diminish the amount of any weekly payment ordered to be made. . . . . If any married woman upon whose application an order shall have been made . . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged." That is to say, that section in the clearest possible way provides that in certain circumstances the court of summary jurisdiction may discharge what? Particular provisions contained in the order? Not at all, but the order itself. The matters mentioned in s. 5 do not purport to define the whole of the nature of the order; they are a statement of various particular provisions which the order may contain. And then comes s. 7, which provides that an order so made, whatever be the particular part of it affected by the fresh evidence, may be altered, varied or discharged. In my opinion a provision of that kind stands in the strongest possible contrast with the limited terms of s. 30, sub-s. 3, of the Act of 1914, which provides that an order for the periodical payment of money may be dealt with in a certain way. And finally it is provided by sub-s. 5 of that section

that nothing in the section is to affect powers and duties of courts of summary jurisdiction under the Affiliation Orders Act, 1914 (4 & 5 Geo. 5, c. 6). Sect. 7 of this last named Act contains a definition of "affiliation order," which means "an order made under the Bastardy Laws Amendment Act, 1872, or any Act amending the same, adjudging a man to be the putative father of a bastard child and ordering him to pay a sum of money weekly or otherwise to the mother of the bastard child." The order so defined seems to go beyond the limited expression "order . . . . for the periodical payment of money" in s. 30, sub-s. 3, which does not deal with paternity at all. It seems to me therefore that the justices in this case were right. If the argument for the appellant prevailed, then the putative father might entirely fail to obey the order, and at any time and upon any number of occasions, if he thought himself to be in a position to produce fresh evidence, might go to the court of summary jurisdiction and ask it to revoke the whole order, including the fundamental part of it relating to the paternity. In my opinion this appeal fails and should be dismissed.

AVORY J. I have come to the conclusion that the justices in this case were right, although the provisions of s. 30, sub-s. 3, of the Act of 1914, particularly when viewed in the light of s. 37, sub-s. 2, undoubtedly afford ample scope for the argument for the appellant, because s. 37, sub-s. 2, among other things, provides that an appeal shall lie to quarter sessions from any order made by a court of summary jurisdiction under the enactments relating to bastardy, or from any refusal by a court of summary jurisdiction to make such an order, or from the revocation, revival or variation of such an order. So that s. 37 seems to contemplate an appeal from a revocation of any order which has been made by a court of summary jurisdiction under the Bastardy Acts, from which it would appear that a court of summary jurisdiction can revoke any order that has been made. The inconvenience which would result from holding that s. 30, sub-s. 3, entitles the man to come to the court over and over

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again on the suggestion of fresh evidence asking for a revocation of the order, and also entitles the woman in the same way to ask the Court to revive the order, precludes me from thinking that such a construction should be put on the sub-section. I think the powers it confers are limited to the order for the periodical payment of money, although that order may be consequential upon the order as to the paternity.

I have been troubled with a doubt whether our decision can be reconciled with the case of *Grocock* v. *Grocock* (1), in which case the judgment of Grove J. in *Davies* v. *Evans* (2) was expressly approved, in which he held that the enforcement of the order was discretionary in the justices. But on close examination of the latter case it seems to be clear that it turned on the words of s. 4 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), "if at any time after the expiration of one calendar month from the making of such order . . . . it be made to appear to any one justice . . . . that any sum to be paid in pursuance of such order has not been paid such justice may, by warrant . . . . cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order . . . . such two justices may, by warrant . . . . direct the sum so appearing to be due . . . . to be recovered by distress . . . . and may order such putative father to be . . . . kept in safe custody until return can be conveniently made to such warrant of distress . . . . but if upon the return of such warrant . . . . it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant . . . . cause such putative father to be committed," and the decision of Grove J. was really only a decision that the word "may" in that section must be considered as permissive and not imperative. If that is so, that decision is not inconsistent with our view that the operation of s. 30, sub-s. 3, of the Act of 1914, is limited to an order for the periodical payment of money, and does not confer on the justices a discretion to refuse to enforce the order at all. There is one other point which

(1) [1920] 1 K. B. 1. (2) 9 Q. B. D. 238.

arises, although it was not the ground upon which the justices decided, but it emerges on the face of the case—namely, whether there was "fresh evidence" within the meaning of the sub-section. The meaning of that, as laid down by Hill J. in *Timmins* v. *Timmins* (1), is "evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not by reasonable means have come to his knowledge before that time." There is no suggestion here that the evidence tendered was of that nature, and therefore I think the evidence was not "fresh evidence" within the sub-section.

SHEARMAN J. I agree. I have felt great difficulty in thinking that the power conferred on the justices of revoking an order for the periodical payment of money does not include the power to deal with the question whether or not the order was justly made. But I am now satisfied that we are entitled to interpret s. 30, sub-s. 3, of the Act of 1914, as intending that the justices shall only deal with the periodical payment. Any other conclusion would have most inconvenient results. With regard to the question of fresh evidence I agree with what has been said by my brother Avory.

Appeal dismissed.

Solicitors for appellant: *Field, Roscoe & Co., for Aldous & Gotelee, Ipswich.*

Solicitors for respondent: *Marshall & Son, Ipswich.*

(1) [1919] P. 75, 80.

W. L. L. B.

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April 15, 16;
May 11.

FIELD *v.* CURNICK AND OTHERS.

[1925. F. 747.]

Landlord and Tenant — Lease — Covenant to repair — Covenant to build two Houses and to repair "the said premises" — Six Houses built simultaneously on demised Premises—Extent of Obligation to repair.

By a lease dated 1837 the lessors demised to the lessee for ninety-nine years a piece of ground, "together with the messuages or tenements and all other erections and buildings which at any time hereafter during the said term shall be built on the same piece of ground or any part thereof," and the lessee covenanted to build on the ground demised two good and substantial brick messuages or tenements, and to repair and keep repaired "the said premises." The lessee built six houses, as to which it was impossible to say which two were actually completed first; but the judge came to the conclusion on the evidence that the six were built simultaneously and finished at the same time:—

Held, that the covenant to repair extended not only to the two houses which the lessee covenanted to build but to all the six houses.

ACTION tried by Sankey J.

By a lease dated August 25, 1837, certain lessors, of whom the plaintiffs were the successors in title, demised to one Henman a piece of land situate in Devonshire Street, Mile End, of the measurements there set out, "together with the messuages or tenements and all other erections and buildings which at any time hereafter during the said term shall be built on the same piece of ground or any part thereof," for the term of ninety-nine years, at a ground rent of 13*l.*, and the said Henman, his executors, administrators and assigns covenanted to build and completely finish fit for habitation and use upon the piece of land thereby demised, within three years, "two good and substantial brick messuages or tenements," and he also covenanted during the said term that he and they would well and sufficiently repair, maintain, paint and keep "the said premises respectively with the appurtenances in such good and substantial repair as is necessary for occupation at rack rent and the said demised premises being in all things repaired maintained paved painted . . . . at the end or other sooner determination of the said term will quietly yield up unto the said" lessors; he further

covenanted to insure and keep insured "the buildings hereafter to be erected on the said ground." The lease empowered the lessors to enter the premises to examine their condition, and Henman, his executors, administrators or assigns, covenanted to repair within three months after written notice given of want of repair; and the lease contained a proviso for re-entry by the lessors if default should be made in the observance or performance of any of Henman's covenants.

Six messuages or tenements known respectively as Nos. 122, 124, 126, 128, 130 and 132 Devonshire Street were erected on the said piece of land, and on the evidence the judge found that the six were built simultaneously and finished at the same time.

The plaintiffs alleged that the defendants, who were the assignees, underlessees or in possession of the said houses, had committed breaches of the covenant to repair contained in the said lease, and they claimed possession of the premises, mesne profits and damages.

The houses Nos. 126 and 128 Devonshire Street were those in respect of which the action was now concerned. The defendants, who were the assignees, underlessees or in possession of those two houses, said that the covenant by Henman in the lease of 1837 was to build two good and substantial brick messuages or tenements and no more, and they contended that the repairing covenant did not refer and was not intended to refer to any messuages and tenements other than those to be erected in accordance with the building covenant, and they said that neither of the premises Nos. 126 and 128 was one of the premises erected under the said building covenant; and further, that the house No. 128 had been repaired by June 30, 1925, but if it should be held that the defendants had committed a breach of the repairing covenant in respect of No. 128, they claimed relief under s. 14 of the Conveyancing Act, 1881.

Macmorran K.C. and *E. J. Naldrett* for the plaintiffs.

J. D. Casswell for the defendants. The repairing covenant

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in the lease extends only to the two tenements which the lessee covenanted to erect: *Doe* v. *Rowlands* (1); *Cornish* v. *Cleife* (2), and as it has not been shown that the two houses now vested in the present defendants were the two that the lessee covenanted to erect, those defendants are not liable. Further, if there is any ambiguity as to the meaning of the repairing covenant it must be construed against the grantees. The repairing covenant is not affected by the description in the parcels, and, further, it is to be observed that the covenant to insure relates to "the buildings hereafter to be erected," that is, the two covenanted to be erected.

Macmorran K.C. in reply. The cases establish that if there is a general covenant to repair it extends not only to buildings on the land at the time of the demise but to those to be afterwards erected: see per Fletcher Moulton L.J. in *Rose* v. *Spicer*. (3)

[SANKEY J. That case was reversed in the House of Lords sub nom. *Hyman* v. *Rose*. (4)]

Not on the point dealt with by Fletcher Moulton L.J. In *Smith* v. *Mills* (5), where *Cornish* v. *Cleife* (2) was cited, the law was laid down by Bigham J. in the same way. Moreover, as is shown by the parcels, the lease clearly means that all houses built on the demised land shall be kept in repair.

Cur. adv. vult.

May 11. SANKEY J. read the following judgment: The plaintiffs' claim in this action is to recover possession of a piece of ground having a frontage to Devonshire Street, Mile End, in the county of Middlesex, together with six messuages erected thereon and known as Nos. 122, 124, 126, 128, 130 and 132 Devonshire Street, upon the ground that the defendants have failed, after notices duly given under the Conveyancing Act, 1881, to comply with a covenant

(1) (1841) 9 C. & P. 734, 740.
(2) (1864) 3 H. & C. 446.
(3) [1911] 2 K. B. 234, 248.
(4) [1912] A. C. 623.
(5) (1899) 16 Times L. R. 59.

to keep the said messuages in repair. The plaintiffs further claim mesne profits and damages for breach of the said covenant.

Upon the record there appeared the names of a large number of defendants who were either lessees, sub-lessees or assignees, and at the conclusion of the case I was informed that it might be necessary to give notices to still other parties who however did not appear. For the purpose, however, of working out this judgment I direct that any such notices shall be given and there will be liberty to apply.

I was informed that in respect of No. 122 judgment had gone by default. In respect of Nos. 124, 130 and 132 relief against forfeiture had been obtained.

With regard to No. 126 it was admitted by the defendant in that case that no repairs had been carried out. Of that house Emma Rhodes was the lessee and Elizabeth Holman the weekly tenant.

With regard to the remaining house No. 128, George Curnick and Hilda Curnick were assignees when the writ was issued upon May 11, 1925, and subsequently Pauline Jaffe, who became assignee on June 12, 1925, was added as a defendant. On their behalf it was contended that there had been no breach of the covenant to repair, because such covenant did not apply to No. 128.

The facts are as follows :—

By an indenture of lease dated August 25, 1837, certain lessors, of whom the plaintiffs are the successors in title, demised to one Henman, of whom the defendants are the successors in title, a piece of ground situated in Devonshire Street aforesaid together with the messuages or tenements or erections or buildings which should thereafter be built thereon for a term of ninety-nine years from June 24, 1837, at a yearly rent of 13*l.* payable on the usual quarter days.

The lessee covenanted within the space of three years from the date of the lease in a substantial and workmanlike manner to build and completely finish fit for habitation two good and substantial brick messuages thereon. He further

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covenanted as occasion should require during the said term well and sufficiently to repair, maintain, paint, empty, cleanse, amend and keep the said premises respectively with the appurtenances in such good and substantial repair as should be necessary for occupation at rack rent, and further to yield up the said premises in good repair at the end of the term. The lessee, instead of building two houses on the demised plot, built the six houses in question.

At this distance of time it is quite impossible to say which two of the said six houses were actually completed first, but from the evidence before me, I have come to the conclusion that the six were built simultaneously and finished at the same time. They are not separate houses, or even semi-detached ones, but are in a row. They are built of the same material, to one design, and are in agreement one with another and of uniform height and elevation.

The question for determination is whether the covenant in question to repair applies, the defendants saying that its effect is exhausted by reason of the fact that such covenant only extended to two houses and that the plaintiffs admit that three have now been repaired—namely, 124, 130 and 132, and relief has been obtained.

A number of cases were cited before me, but none is exactly in point. The nearest are *Cornish* v. *Cleife* (1) and *Smith* v. *Mills*. (2) There is a general passage by Fletcher Moulton L.J. in *Rose* v. *Spicer* (3) which I think is still good law, although that case was reversed on appeal in the House of Lords. The passage in question is as follows: "In the first place it was suggested that it was not proved that the railings and the wall on which they stand were erected at the date of the execution of the lease. I entirely fail to appreciate the relevance of the remark. Whenever erected they became on erection part of the freehold to which they were annexed, and it is elementary law that a general covenant to repair and maintain such as we have here would apply to them. If

(1) 3 H. & C. 446. (2) 16 Times L. R. 59.
(3) [1911] 2 K. B. 234, 248.

a lessee whose lease contains such a covenant erects a house on the land leased to him he is just as much bound to maintain it and keep it in repair as if it had been built before the lease was granted."

In my view the law is as follows : If a lessor demises a house and there is an express covenant to repair, the lessee is of course bound by it. If, on the other hand, the lessor demises a piece of land and there is an express covenant by the lessee to repair any houses subsequently erected thereon, equally the lessee is bound by it. Further, a general covenant to repair includes not merely buildings existing when the demise is made, but all those which may be erected during the term : see *Cornish* v. *Cleife* (1) and Foà on Landlord and Tenant, 6th ed., p. 248. If, however, the covenant to repair is only one to keep in repair the demised premises it applies to those existing at the date of the lease only unless the new buildings are made part of the old ones.

The point in this case therefore is, does the covenant to repair extend to the six houses in question ? Having regard (1.) to the parcels in the demise, " together with the messuages or tenements and all other erections and buildings which at any time hereafter during the said term shall be built on the same piece of ground or any part thereof," and (2.) to the fact that those houses were all built simultaneously in a row, as above pointed out, I have come to the conclusion that the covenant to repair does extend to all the houses. No point was raised as to the propriety of the notice given under the Conveyancing Act, and I have therefore come to the conclusion that the plaintiffs are entitled to succeed. The evidence placed before me was of a somewhat meagre character, but I think there ought to be, in respect of house No. 126, judgment for the plaintiffs for possession, together with such mesne profits calculated at the same rate as the rent would have been.

In respect of house 128 the defendants are claiming relief under s. 14 of the Conveyancing Act, 1881, and although, as above stated, I think the plaintiffs are entitled to succeed,

(1) 3 H. & C. 446.

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I think this is a case where the defendants ought to have relief on proper terms. My judgment therefore will be accordingly.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Horsley & Weightman.*
Solicitors for defendants: *Savage Cooper & Wright.*

J. S. H.

C. A.

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April 28, 29; *May* 20.

[IN THE COURT OF APPEAL.]

BENNETT *v.* L. AND W. WHITEHEAD, LIMITED.

Employer and Workman—Compensation—Action for Damages—Alternative Claim for Compensation—Discontinuance of Action—Subsequent Claim for Compensation—Option—Election—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-ss.* 2 (*b*), 4—*Workmen's Compensation Act,* 1923 (13 *& 14 Geo.* 5, *c.* 42), *s.* 18.

A workman employed by a firm of builders, who were doing repairs to certain business premises under a contract with the owners, was injured by an accident arising out of and in the course of his employment. He brought an action in the county court against his employers in which he made three alternative claims: (1.) for damages under the Employers' Liability Act, 1880; (2.) for damages for negligence at common law; and (3.) for compensation under the Workmen's Compensation Acts. He discontinued that action, and then commenced fresh proceedings against his employers for compensation only under the Workmen's Compensation Acts:—

Held (by Bankes and Atkin L.JJ.; Scrutton L.J. dissenting), that s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, did not debar him from proceeding with his claim for compensation.

APPEAL from the judge of the County Court of Surrey holden at Lambeth, who decided in favour of the employers on a workman's claim for compensation under the Workmen's Compensation Acts.

The applicant was a scaffolder in the employment of L. and W. Whitehead, Ld., a firm of builders and contractors carrying on business at 2 Portland Place North, Clapham Road, London. On January 7, 1925, he was injured by an accident arising out of and in the course of his employment.

On that day his employers were carrying out certain repairs at 47 to 49 Kingsland Road, the business premises of Eaton Parr & Gibson (Glass Merchants), Ld. On January 22 the applicant's solicitors gave notice to the employers that on January 7, 1925, at about 4.30 o'clock, whilst in their employment engaged as a scaffolder at 47–49 Kingsland Road, the applicant proceeding down the stairway on the last mentioned premises caught his foot in the broken leaden covering of the stairway and fell down the stairs and suffered injuries for which he was being treated in the Metropolitan Hospital, Kingsland Road. The notice concluded thus: "Pending our inquiries into the case on behalf of our client we reserve our client's rights under the Employers' Liability Act, the Workmen's Compensation Acts, or at common law."

On January 23 and 26, 1925, the employers admitted liability under the Workmen's Compensation Acts, and offered to pay compensation at 1*l.* 10*s.* a week.

On February 10 the applicant's solicitors gave the employers notice of a claim under the Employers' Liability Act, 1880; and on April 9, 1925, the applicant brought an action under that Act in the Whitechapel County Court and alleged in the particulars of claim that owing to a defect in the stairway at 47–49 Kingsland Road, known only to the defendants by their foreman, he caught his foot therein and fell and broke his right thigh. Alternatively he claimed at common law that the defendants were negligent in that having purported to repair the stairway they failed to repair it properly and with knowledge of its defective condition permitted him to use the stairway without warning him. He claimed 300*l.* under the Employers' Liability Act, 1880. He limited his alternative claim at common law to 100*l.* In the further alternative and in the event of his failing to recover damages, he claimed compensation at the rate of 1*l.* 10*s.* a week under the Workmen's Compensation Acts, 1906 to 1923, and a declaration of liability.

On June 5, 1925, he gave notice to discontinue this action, and on June 11, 1925, he issued a writ in the King's Bench Division against Eaton Parr & Gibson, Ld., for negligence in

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failing to warn him of a concealed defect in the stairway of which they knew. This action was remitted to the Shoreditch County Court. It came on for trial in that court on October 20, 1925, and judgment was given for the defendants on the ground that there was no evidence of negligence.

The applicant then on December 1, 1925, took proceedings in the Lambeth County Court against L. and W. Whitehead, Ld., in which he claimed 1*l.* 10*s.* a week compensation under the Workmen's Compensation Acts. L. and W. Whitehead, Ld., denied liability on the ground that the applicant had taken proceedings against them independently of the Workmen's Compensation Acts, in which proceedings it was not determined that the injury caused by the accident was one for which they were not liable therein, and that the applicant's claim did not arise independently of the Workmen's Compensation Acts.

The county court judge held, following the law laid down by Scrutton L.J. in *Harrison* v. *Wythemoor Colliery Co.* (1), that if a workman takes common law or statutory proceedings by way of action against his employer, he elects that remedy, and can only obtain compensation by the exact procedure prescribed in s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906. (2) He therefore made an award in favour of the employers.

The applicant appealed.

(1) [1922] 2 K. B. 674, 700.

(2) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1: If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

Sub-s. 2. Provided that—

(*a*) the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed:

(*b*) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not

Fior for the appellant. The county court judge was wrong in holding that the appellant, by instituting the proceedings of April 9 and therein claiming alternative relief, exercised any option or made any election which precluded him from afterwards claiming compensation under the Workmen's Compensation Acts. A claim for compensation was one of the alternative claims. Therefore up to the time when he discontinued those proceedings he cannot be said to have elected one form of relief rather than another. Further, the option given by s. 1, sub-s. 2 (*b*), of the Act of 1906 is not between merely commencing proceedings for one kind of relief or another; it is between recovering damages, whether at common law or under the Employers' Liability Act, 1880, on the one hand, and recovering compensation under the Workmen's Compensation Acts, on the other. The difference is between instituting proceedings and prosecuting proceedings to a conclusion. The object of the Legislature is shown by

be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid . . . .

Sub-s. 4 [as amended by s. 18 of the Workmen's Compensation Act, 1923 (13 & 14 Geo. 5, c. 42)]: If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried, or, if the determination is the determination on an appeal (by either party) by an appellate tribunal, that tribunal shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section, when the Court or appellate tribunal assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction of costs, and such certificate shall have the force and effect of an award under this Act: Provided that an appellate tribunal may, instead of itself assessing such compensation, remit the case to the county court for the assessment of the compensation, and in such case may order the county court to deduct from the amount of compensation assessed by it all or part of such costs as aforesaid.

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the words of sub-s. 2 (*b*): "The employer shall not be liable to pay compensation . . . . both independently of and also under this Act." Even if the proceedings instituted on April 9 had included no alternative claim for compensation they would not have barred a subsequent claim, first because, inasmuch as they were abandoned, the employer was not made liable to pay compensation independently of the Workmen's Compensation Acts; and secondly, because by s. 1, sub-s. 4, of the Act of 1906, as amended by s. 18 of the Act of 1923, where the plaintiff fails in an action brought to recover damages independently of the Act, he may nevertheless call upon the Court to assess compensation under the Act.

[*Beckley* v. *Scott & Co.* (1) and *Rouse* v. *Dixon* (2) were cited.]

Dale for the respondents. The intention of the Legislature is to be gathered from the words of s. 1, sub-s. 2 (*b*), of the Act of 1906: "The workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer . . . . shall not be liable to any proceedings independently of this Act, except in case of" personal negligence, etc. In *Edwards* v. *Godfrey* (3) A. L. Smith L.J., construing the similar provision in the Act of 1897, states the option as being between "bringing an action at common law" and "resorting to the procedure for the assessment of compensation given by the Act itself"; and this is referred to with approval by Cozens-Hardy M.R. in *Cribb* v. *Kynoch.* (4) Moreover in that case the dissenting judgment of Holmes L.J. in *Beckley* v. *Scott & Co.* (1) was approved by this Court in preference to opinion of the majority; and Holmes L.J. expressed the view that the employer is not "to be subjected to the expense, trouble, and inconvenience of two sets of proceedings." (5)

If the workman brings an action at common law or under the Employers' Liability Act, 1880, he may recover damages

(1) [1902] 2 I. R. 504.
(2) [1904] 2 K. B. 628.
(3) [1899] 2 Q. B. 333, 337.
(4) [1908] 2 K. B. 551, 556.
(5) [1902] 2 I. R. 533.

or he may fail. If he recovers damages he cannot then take proceedings for compensation under the Workmen's Compensation Acts: *Edwards* v. *Godfrey* (1); if he fails he may apply under s. 1, sub-s. 4, to have compensation assessed; but that is the only way in which he can then have compensation: *Harrison* v. *Wythemoor Colliery Co.* (2) If having brought an action for damages he does not in that action have compensation awarded, he has no further remedy.

[*King* v. *Edinburgh Collieries Co.* (3) was also cited.]

Fior in reply.

Cur. adv. vult.

May 20. The following written judgments were delivered:

BANKES L.J. In this appeal the question for decision is whether the workman in the events which had happened was entitled to maintain proceedings under the Workmen's Compensation Acts.

The workman met with an accident when working for his employers on premises belonging to Eaton Parr & Gibson, Ld. He commenced proceedings in the Whitechapel County Court against his employers, claiming 300*l.* damages under the Employers' Liability Act, 1880. In those proceedings he made the following alternative claims: (*a*) a claim for damages at common law, limiting the damages to 100*l.*, and (*b*) "in the further alternative and in the event only of the Court holding that the plaintiff has failed to justify his claim hereinbefore set out, compensation at the rate of 30*s.* per week under the Workmen's Compensation Acts, 1906 and 1923, and a declaration of liability."

These proceedings were commenced within six months of the happening of the accident. The particulars are dated April 9, 1925. On June 5, 1925, notice of discontinuance of these proceedings was given, and on June 11 a writ was issued against Eaton Parr & Gibson, Ld., the plaintiff presumably having been advised that he had a good cause of action against them on the ground that the accident was due to the

(1) [1899] 2 Q. B. 333. (2) [1922] 2 K. B. 674.
(3) 1924 S. C. 167

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condition of their premises. This action came on for trial, and the plaintiff failed. He thereupon, in November, 1925, commenced proceedings in the Lambeth County Court under the Workmen's Compensation Acts.

At the hearing, a preliminary objection was taken that the proceedings were not maintainable by reason of the provisions of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, the plaintiff having conclusively elected to take proceedings independently of the Act. Founding himself upon a dictum of Scrutton L.J. in *Harrison* v. *Wythemoor Colliery Co.* (1), the learned county court judge upheld the objection. This appeal is from that decision. The objections taken in the respondents' answer, some of the arguments addressed to the learned judge, and some of his observations, all point to the conclusion that at the hearing in the county court great stress was laid on the fact that the action had been brought by the workman against Eaton Parr & Gibson, Ld. It is quite plain that for the purpose of considering the application of the material portions of the Workmen's Compensation Act to this case, the fact that that action was brought is quite immaterial. The introduction of that action into the case only tended to confusion. For the decision of the question before the Court it must be left altogether out of consideration.

The material portions of s. 1 of the Act of 1906 are sub-ss. 1, 2 (*b*), and 4. They provide as follows. [The Lord Justice read s. 1, sub-ss. 1, 2 (*b*), and 4, and proceeded :] The main object of the Legislature evidently was to protect the employer from the possibility of having to pay a workman twice over for one injury ; incidentally also to protect the employer from unnecessary expense in defending proceedings against himself. It is however equally plain from the provisions in sub-s. 4 that the Legislature did not intend to shut out the workman altogether from the possibility of obtaining compensation under the Act, even where he has made an election to proceed against his employer at common law and has failed. The main object of the Legislature is

(1) [1922] 2 K. B. 674, 700.

attained by putting the workman to his election. It is to be noticed that the Act itself gives no indication of what constitutes an election. It leaves the question to be determined by the general law. It is to be noticed also that the Act itself gives no indication of what was in the mind of the Legislature when it declared that the option was to be between a "claim for compensation" (which has been held by the House of Lords to mean not the initiation of proceedings, but a notice of claim: *Powell* v. *Main Colliery Co.* (1)), and a taking of proceedings independently of the Act.

The question for decision in the present appeal is what is the construction to be placed upon this language? Does it refer to the mere initiation of the one proceeding or of the other, or does it refer to such a prosecution of the one proceeding or of the other that a conclusion can be drawn that a conclusive election has been made between the one proceeding and the other? The Legislature might easily have indicated, had it so desired, that the commencement of the one proceeding or of the other should be the decisive test. It has refrained from doing so, and has left the question to be determined by a consideration of what constitutes an exercise of the option given to the workman by the Act. On the question of construction of the Act, one naturally sympathizes with the view of Kennedy J. as he then was, when at the end of his judgment in *Rouse* v. *Dixon* (2) he says that "one would, indeed, be unwilling, unless obliged by the language of the statute, to hold that the Legislature intended to bar a workman from all other rights if he had made a claim which he abandoned when it was clearly shewn that the case did not come within" the Act. If the question had to be decided as a question of construction merely, I see nothing in the language of the Act which renders it necessary to hold that the workman must exercise his option before commencing any proceedings. That this is the correct view is, I think, supported by a consideration of the law relating to election. Atkin J. (as he then was) had to consider this question of election as applied to s. 1, sub-s. 2, of the Workmen's

(1) [1900] A. C. 366. (2) [1904] 2 K. B. 628, 634.

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Compensation Act in the case of *Codling* v. *Mowlem & Co.* (1) I cannot do better than quote the following passage: "As to the first point it appears to me that the question of election is principally one of fact. 'In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge, as was done in the case of *Calder* v. *Dobell* (2); but there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal': per Quain J. in giving the judgment of the Court of Queen's Bench in *Curtis* v. *Williamson*. (3) 'The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election': *Scarf* v. *Jardine* (4), per Lord Blackburn. Moreover, there cannot be an election without knowledge of the right to elect: *Kendall* v. *Hamilton* (5), per Lord Blackburn."

Applying the law as laid down in those decisions I ask myself the same question as the learned judge asked himself in *Codling's* case (6)—namely, do the facts of this case establish

(1) [1914] 2 K. B. 61, 66; affirmed [1914] 3 K. B. 1055.
(2) (1871) L. R. 6 C. P. 486.
(3) (1874) L. R. 10 Q. B. 57, 59.
(4) (1882) 7 App. Cas. 345, 360, 361.
(5) (1879) 4 App. Cas. 504, 542.
(6) [1914] 2 K. B. 61; 3 K. B. 1055.

such an unequivocal act by the workman as compels me to hold as a matter of law that he elected to take his remedy at common law? The present case presents some peculiar features. In the first place it is clear that the mere fact of commencing common law proceedings is not in itself an election not to claim compensation under the Act. The provisions of sub-s. 4 negative any such conclusion. The most that can be said of commencing common law proceedings is that it indicates the then intention of the workman to pursue all the remedies which the law allows him. In the next place the present case is one in which the special procedure allowed both in the High Court and in the county court of discontinuance was followed. The procedure in the county court is laid down in Order IX., r. 1. This rule provides that subject to a liability to pay costs a plaintiff may discontinue his action as a whole, or may withdraw any part of his alleged cause of complaint, and he may, subject to the right of the Court to stay his proceedings if he has failed to pay the costs of the former proceedings, commence over again the proceeding which he has either discontinued or withdrawn. Unless I am bound by authority I am not prepared to hold in the present case that the workman made such a conclusive election to claim compensation only after failure of his common law claim, as to disentitle him to do what he did—namely, discontinue those proceedings and claim arbitration under the Act.

In coming to this conclusion I am influenced by the fact that the only evidence upon which the Court is asked to act is the commencing of proceedings, which include a claim at common law, and I am influenced also by the fact that had the workman merely withdrawn his common law claim, instead of discontinuing the whole action, he could presumably have successfully maintained his claim for compensation. If the matter is not concluded by authority, I should say that every case must be decided upon its own particular facts, but that if the only fact relied on is the mere commencing of proceedings at common law, that in itself is not sufficient evidence of a conclusive election. To test the question it

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is useful to take one or two extreme instances. Take for instance a case where a workman issued a writ, but discontinued before service; or a case where after issue of the writ, and after service, but before appearance, he discontinued. In such cases ought the issue of the writ to be held to be such a conclusive election as to compel the workman either to continue his proceedings at common law or to lose altogether his right to claim compensation? On the other hand, there may be cases in which the action of the workman in merely commencing and discontinuing proceedings might justly be held to indicate a conclusive election. For instance, in the present case the commencing arbitration proceedings, after having discontinued the common law proceedings, is such an unequivocal act as may reasonably be held to constitute a conclusive election. In *Scarf* v. *Jardine* (1) there appears to be some hesitation on the part of the Lord Chancellor in holding that the mere issue of a writ was in itself a conclusive election. Lord Blackburn had no such doubt. He expresses himself forcibly (2), and his language may well apply to any case where the facts are the same. But I venture to question the applicability of his view to the election rendered necessary by the Workmen's Compensation Act as between two inconsistent remedies for one and the same injury. In *Curtis* v. *Williamson* (3) the mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undisclosed principal was held not to amount to a conclusive election to treat the agent as the debtor. In *Clough* v. *London and North Western Ry. Co.* (4) it was pointed out what an important element in dealing with a question of election the lapse of time may be. If, therefore, it is open to the Court to consider any circumstances other than the mere commencement of the proceedings, there may be cases in which the conduct of a litigant in persistently pressing one form of remedy may be construed as a conclusive election to adopt that remedy to the exclusion of some other form of remedy, even though his first course of proceeding is not carried to a conclusion.

(1) 7 App. Cas. 345, 348.
(2) 7 App. Cas. 362.
(3) L. R. 10 Q. B. 57.
(4) (1871) L. R. 7 Ex. 26, 35.

I will now pass on to deal with the authorities. In Scotland the recent case of *King* v. *Edinburgh Collieries Co.* (1) is a decision of the Court of Session, which is clearly in accordance with the view which I am about to express. There the workman had served a notice of claim under the Workmen's Compensation Act, and had subsequently commenced an action at common law. The Court did not take the view that the commencing of either of these proceedings was a conclusive election in itself, but held that the workman was not entitled to pursue both remedies at the same time, and that the proper course was to stay the action for a reasonable time in order to give him the opportunity to make his election. In Ireland the Court of Appeal by a majority have gone much further than the Scotch Court, for in *Beckley* v. *Scott & Co.* (2) Fitzgibbon and Walker L.JJ. held that where a workman claimed compensation and failed, he was still entitled to bring an action at common law for damages. This decision has not met with approval in our Courts. I will now deal with the principal decisions in order of date. In *Edwards* v. *Godfrey* (3) the workman had brought an action at common law, had proceeded to trial, and had failed. It was held that he could not afterwards initiate independent arbitration proceedings. Upon the facts of that case the workman's election was obviously a conclusive one upon the view of the law which had certainly prevailed in our Courts—namely, that proceedings carried to a determination are conclusive evidence of a final election. I do not think that the language used by the learned judges ought to be read as any expression of opinion upon a state of facts which was not before them. I do not therefore consider this case an authority upon the question which we have to decide. *Isaacson* v. *New Grand (Clapham Junction), Ld.* (4), was a case raising a question several times discussed in later cases as to the position of a workman who, having commenced proceedings at common law and failed, then applies for compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act. The view of the law taken

(1) 1924 S. C. 167; 17 B. W. C. C. 324.
(2) [1902] 2 I. R. 504.
(3) [1899] 2 Q. B. 333.
(4) [1903] 1 K. B. 539.

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in that case by the Divisional Court has been expressly disapproved by the Court of Appeal, and it is unnecessary to discuss it, as the applying for the assessment of compensation without any attempt to avoid making an election, might very properly under the circumstances be interpreted in itself as a conclusive election. In *Rouse* v. *Dixon* (1) the facts are not clearly stated. It is said that the workman withdrew his claim, and on the day fixed for the hearing the county court judge made an order that he should pay the defendants, costs. If this means that the workman proceeded to an adjudication in the arbitration proceedings, the decision was clearly opposed to the general line of authorities on the point, and has been expressly disapproved by the Court of Appeal. *Neale* v. *Electric and Ordnance Accessories Co.* (2) needs careful consideration, because of some of the expressions of opinion by the Master of the Rolls. Upon the facts of that case there was in my opinion a clear case of conclusive election. Upon the failure of common law proceedings the workman took advantage of the provisions of s. 1, sub-s. 4, of the Workmen's Compensation Act, and asked for and obtained an assessment of compensation without any attempt to avoid making an election. Collins M.R., in dealing with *Edwards* v. *Godfrey* (3), treats it as a decision only applicable to a case where a workman has proceeded with his common law action to a determination (4), and he distinguishes *Isaacson* v. *New Grand, Ld.* (5), on the ground that in that case the application for assessment of compensation had not been granted. In *Cribb* v. *Kynoch* (6) the common law proceedings of the workman had been carried to a determination. The case, therefore, is only of value for the expressions of opinion of the Lords Justices who formed the Court. Cozens-Hardy M.R. said (7): "I think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail, and then proceed by common law

(1) [1904] 2 K. B. 628.
(2) [1906] 2 K. B. 558.
(3) [1899] 2 Q. B. 333.
(4) [1906] 2 K. B. 563.
(5) [1903] 1 K. B. 539.
(6) [1908] 2 K. B. 551.
(7) [1908] 2 K. B. 555.

action, and also cannot proceed by common law action and, having failed in that action, then proceed under the Act." The Master of the Rolls goes on to deal with *Beckley* v. *Scott & Co.* (1), and expresses his preference for the dissenting judgment of Holmes L.J., quoting that passage from his judgment in which he speaks of a matter as having been fought and adjudicated upon in one tribunal. The Master of the Rolls also deals with the judgment of Kennedy J. in *Rouse* v. *Dixon* (2) without expressing any dissent from his view that it was not impossible to construe s. 1, sub-s. 2 (*b*), as meaning that the option may be exercised unless and until the claim has proceeded to a decision. Buckley L.J. (3) lays great stress on the fact that the workman commenced the common law action more than six months after the injury. By doing so the Lord Justice says the workman was affirming that the employer was under a common law liability, and (4) he treats an application under sub-s. 4 as the only means by which an unsuccessful plaintiff in an action is to be entitled after the expiration of six months to recover the statutory compensation. Kennedy L.J. repeats his view expressed in *Rouse* v. *Dixon* (2), when he says: "In other words, it seems to me that when a decision is given either way the workman must be considered as having made his option. . . . ." The dicta in this case appear to me to favour the view that in the opinion of that Court the mere commencing of common law proceedings, if commenced within six months from the injury, would not of itself constitute a final election.

The most recent decision is *Harrison* v. *Wythemoor Colliery Co.* (5), where the facts were the same as in *Neale* v. *Electric and Ordnance Accessories Co.* (6), except that the workman had endeavoured to keep open his right to elect by asking the judge at the trial to assess the compensation without prejudice. It was held that the judge had no jurisdiction to make any such order, and the assessment was final. Under these

(1) [1902] 2 I. R. 504.
(2) [1904] 2 K. B. 628.
(3) [1908] 2 K. B. 560.
(4) [1908] 2 K. B. 561.
(5) [1922] 2 K. B. 674.
(6) [1906] 2 K. B. 558.

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circumstances the Court were really dealing with a proceeding carried to a determination, and the point which we have to decide was not before them. So far as the Master of the Rolls is concerned, his view would apparently have been that the mere commencing of common law proceedings would not have amounted to a conclusive election. He says (1): "It seems to me that by sub-s. 2 (*b*) standing alone the workman is given a choice of two methods of procedure but cannot pursue both, and if a common law action is determined against him he cannot afterwards proceed under the Workmen's Compensation Act." Warrington L.J. apparently takes the same view in very much the same language. (2) Scrutton L.J. sums up his judgment in the passage relied upon by the learned county court judge. (3)

Taking these decisions as a whole there is in my opinion no decision upon a state of facts identical with or closely approaching those upon which we have to decide. Upon the whole the dicta are more favourable to the view I am about to express than against it. I consider that I am free to express my own opinion and that I have a considerable amount of judicial opinion in support of it. My view is that upon the facts of this case I am free to consider whether the workman did exercise a final election which precluded him from taking the arbitration proceedings which the county court judge dismissed. I think that he did not. In coming to this decision I desire to add that I do not consider that it necessarily follows that there can be no conclusive election unless and until a determination of the proceedings brought by the workman is arrived at. I can conceive a number of circumstances which, added to the commencing of one particular form of proceeding, might lead to the conclusion that a final election had been made before any decision in those proceedings had been arrived at.

In my opinion the appeal must be allowed with costs here and below; the decision of the learned county court judge must be set aside, and the matter remitted to him to deal with the workman's application.

(1) [1922] 2 K. B. 686. (2) [1922] 2 K. B. 690. (3) [1922] 2 K. B. 700.

SCRUTTON L.J. This appeal raises again the troublesome questions which have caused considerable differences of opinion in the English, Scotch and Irish Courts, and which arise from the statutory provisions applicable to a workman who is not content with his rights under the Workmen's Compensation Act, 1906, but tries to obtain other rights under the Employers' Liability Act, or under the common law.

The workman here met with an accident on a staircase on January 7, 1925, whilst working for his employers on the premises of a third party. His solicitors on January 22 gave notice of the accident and reserved their "client's rights under the Employers' Liability Act, the Workmen's Compensation Acts, or at common law." The employers, under the instructions of their insurance company, offered to pay him compensation at the rate of thirty shillings a week, which would be under the Workmen's Compensation Acts, and on January 26 admitted liability under the Workmen's Compensation Acts. On February 6 and 10 the workman's solicitors made a formal claim under the Employers' Liability Act, 1880. On April 9 the workman issued a plaint against his employers in the Whitechapel County Court, alleging a defect in the stairway known to the defendants' foreman, and negligence in not repairing the defect. He claimed (1.) 300*l.* under the Employers' Liability Act, and (2.) 100*l.* at common law, and continued: "In the further alternative, and in the event only of the Court holding that the plaintiff has failed to justify his claim hereinbefore set out, compensation at the rate of thirty shillings per week under the Workmen's Compensation Acts, 1906 to 1923, and a declaration of liability." This latter claim was unnecessary, as under s. 1, sub-s. 4, of the Act of 1906, and s. 18 of the Act of 1923, the workman, having brought within six months of the accident an action to recover damages independently of the Workmen's Compensation Acts, was entitled if he failed in that action to ask the Court in that action to assess compensation under the Act of 1906, subject to the penalty that the Court might deduct from the compensation the costs of the action in which the workman had failed. But the claim shows that the

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workman in that proceeding intended to use his rights under sub-s. 4; he could not enforce rights under the Workmen's Compensation Acts by a plaint in the county court, except under sub-s. 4. On June 5, however, the workman discontinued the county court action, having started proceedings in the High Court against the third party, the owners of the premises on which the accident took place, for common law negligence. This action having been transferred to the county court was decided against the workman; whereupon on December 1, 1925, the workman made a request for arbitration in the Lambeth County Court, asking only for compensation under the Workmen's Compensation Acts, to which it was replied that the previous proceedings prevented him from taking this course. The judge decided in favour of this objection, and the workman now appeals.

This brings again before the Court the true meaning of s. 1, sub-ss. 2 (*b*) and 4, of the Workmen's Compensation Act of 1906, the latter sub-section being amended by s. 18 of the Act of 1923. On the meaning of these two sections there has been an embarrassing difference of opinion between the judges of the English, Scotch and Irish Courts, both between nations, and individual judges of the same nation. It is to be hoped that the House of Lords may in some case have the opportunity of giving a final construction of the sections.

Looking at the sections themselves, it appears to be clear that the provision of remedies for the workman is not to exclude other remedies against the employer, either at common law or under the Employers' Liability Act, where the employer or his agent has been guilty of negligence or wilful default, but is to exclude such remedies in any other case. "The employer . . . . shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid": sub-s. 2 (*b*). I think it follows from this that unless a writ against the employer at common law alleged such personal negligence, or wilful act, it could be stayed as showing no cause of action. He is not to be liable to proceedings; not in proceedings. Where there is such negligence, "the workman may, at his option,

either claim compensation under this Act or take proceedings independently of this Act." Apart from authority, I should read these words as meaning he could not both claim compensation under the Act and take proceedings at common law; that if he did so in two proceedings he could be required at once to elect which one he would proceed with, the other being stayed; and that if he took one proceeding he could not afterwards take the other. Apart from Workmen's Compensation proceedings, this would be in accordance with the general language of Lord Blackburn in *Scarf* v. *Jardine*. (1) One Scarf had been a partner in a firm of Rogers & Co.; he had left it; and one Beach had joined Rogers, as Rogers & Beach. A creditor of Rogers & Scarf sued Rogers & Beach. Lord Blackburn said: "The plaintiff goes on and issues a writ against Rogers & Beach—he sues Beach. I am unable to conceive a more unequivocal act; he has thereby adopted Beach as his debtor at that time. I do not think its going to judgment or not going to judgment is material." The language of the Act here seems to me to mean that the workman may on the one hand commence arbitration proceedings, or make a claim under the Act which results in arbitration proceedings, or on the other hand, claim independently of the Act, but that he must not do both; and that he is not allowed to have in progress either concurrently or consecutively two sets of proceedings. But Parliament appears to have seen that it might be a hardship on the workman if he misjudged his remedy, and therefore to have allowed him, if he failed in common law or employers' liability proceedings, started within six months of the accident, at the trial in the same proceedings to ask for compensation under the Workmen's Compensation Act. It has not provided that if in the arbitration he fails under the Workmen's Compensation Act, he can ask for damages at common law, for the probable reason that it is difficult to imagine how such a case can happen, though, as will be seen, the difference has been relied on by Irish judges as justifying their not following an English decision. The Act of 1906 provides that

(1) 7 App. Cas. 345, 362.

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the judge at the trial may in awarding compensation deduct the costs of the unsuccessful common law action. It did not provide for the case of a decision reversed on appeal, and when the cases of *Neale* (1) and *Harrison* (2) pointed out this omission, s. 18 of the Act of 1923 allowed the application for compensation, if necessary, to be made to the final Court giving the decision. Thus if the workman wins at common law in the first Court, and fails on appeal, his victory below does not prevent his getting compensation when he loses the fruits of victory on appeal; and if he loses at common law in the first Court, he may appeal without losing the right to ask for compensation if he fails in the higher Court. In my view "taking proceedings" means what it says, initiating legal proceedings, and "claiming compensation" means making a claim which results in legal proceedings, that is an arbitration either at the request of the workman or employer. In *King* v. *Edinburgh Collieries Co.* (3) a workman made a claim for compensation on his employer, on which the employer requested arbitration proceedings; but the workman then brought common law proceedings. The Scotch Courts required the workman to elect which proceedings he would go on with; he must either abandon his claim for compensation, in which, though he had brought no legal proceedings, the employer had requested arbitration on his claim, or abandon the legal proceedings he had taken at common law. If he did the former, he could claim compensation if unsuccessful in the latter proceedings.

So much for the words of the statute without reference to authorities. But when one turns to the decided cases one finds a great conflict of opinion. Broadly I think the difference is between the view that the employer is only protected against having to pay twice, and cannot complain of two sets of proceedings, and the view that the employer is protected against two sets of proceedings, even should one be unsuccessful. This Court is, I think, bound by decisions of the English Court of Appeal to hold that an unsuccessful

(1) [1906] 2 K. B. 558.
(2) [1922] 2 K. B. 674.
(3) 1924 S. C. 167; 17 B. W. C. C. 324.

proceeding at common law bars a subsequent claim for compensation, except under sub-s. 4; that is to say, the English Court of Appeal has rejected the view that the protection is only against double payment. The questions in this case are: (1.) Whether the Court is bound by previous decisions to hold that one set of proceedings initiated bars the initiation of another set of proceedings, except under sub-s. 4; and (2.) Whether if not so bound the Court should so hold on the true construction of the statutes. The difference of view arose at a very early stage under the Act of 1897, the provisions of which were in this respect substantially the same as those of the Act of 1906. In *Edwards* v. *Godfrey* (1) the workman had brought an action under the Employers' Liability Act and failed; without applying for compensation under sub-s. 4 he then requested arbitration under the Workmen's Compensation Act, and the Court of Appeal held that he could not do so, though there was no question of double payment. A. L. Smith L.J. said (2): "The respondent"—the workman—"brought an action against the appellant under the Employers' Liability Act, and in so doing exercised the option which he undoubtedly possessed in favour of what I may call his common law remedy. . . . . The point taken on behalf of the appellant is that, upon the true construction of the Workmen's Compensation Act, 1897, the respondent could not, after having exercised his option by bringing a common law action, revert to the provisions of that Act and bring proceedings under it for the assessment of compensation. . . . . As I read s. 1, sub-s. 2 (*b*), it gives to the workman, in cases where he would previously have had a right of action, an option, which he may exercise as he likes, of bringing an action at common law, or of resorting to the procedure for the assessment of compensation given by the Act. . . . . The respondent . . . . has exercised his option in favour of bringing a common law action, which has failed. Having been defeated in this action, there would, but for the provisions of s. 1, sub-s. 4, have been an end of any claim by the respondent against the

(1) [1899] 2 Q. B. 333. (2) [1899] 2 Q. B. 336.

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appellant in respect of the injury." It will be noticed that while it was not necessary to go further than saying that a claim brought to decision, though unsuccessfully, barred the workman, the Lord Justice clearly several times makes the barring depend on "bringing an action," "resorting to the procedure." The decision also clearly negatives the view that only "double payment" is barred. In *Cattermole* v. *Atlantic Transport Co.* (1) Stirling L.J. giving the judgment of the Court states the option in the words of the Act as between "claiming compensation and taking proceedings": "If he adopts the latter course, he cannot make any claim under the Act except by virtue of s. 1, sub-s. 4, of the Act."

The leading case for the other view is the Irish case of *Beckley* v. *Scott & Co.* (2) Eight judges were concerned in that case. Three, Wright and Barton JJ. and FitzGibbon L.J., were clearly of opinion that the protection was only against double payment, and it is not the mere claim, but the recovery of compensation under the Act, which puts an end to the other liability: see per FitzGibbon L.J. (3) Two, Gibson J. (4) and Walker L.J. (5), were of the same opinion, but with great hesitation. Three, Johnson and Boyd JJ. and Holmes L.J., took the view, in the language of Holmes L.J. (6), "If the employer is not to be liable to pay compensation both under and independently of the Act, is he to be subjected to the expense, trouble, and inconvenience of two sets of proceedings?" a question which he answers in the negative. Now it is to be noticed that in *Beckley* v. *Scott & Co.* (2) the workman instituted proceedings first for compensation and secondly for damages at common law, reversing the order of proceedings in *Edwards* v. *Godfrey*. (7) This is to be noted, because two of the majority, FitzGibbon L.J. (8) and Walker L.J. (9), seem to have thought that *Edwards* v. *Godfrey* (7) might be right; that a workman, defeated in his common law claim, had his opportunity of getting compensation under

(1) [1902] 1 K. B. 204, 208.
(2) [1902] 2 I. R. 504.
(3) Ibid. 523.
(4) Ibid. 518.
(5) [1902] 2 I. R. 527.
(6) Ibid. 533.
(7) [1899] 2 Q. B. 333.
(8) [1902] 2 I. R. 525.
(9) Ibid. 530.

sub-s. 4 in the same proceedings, in which case he could not bring an independent proceeding for compensation.

I think it is clear that subsequent English cases have rejected the view that the only protection is against double payment, and at any rate extended it to protection against a second proceeding, where the first has been brought to a conclusion though unsuccessfully. In *Taylor* v. *Hampstead Colliery Co.* (1) it was held by this Court that when the workman had joined a certified scheme for compensation under the Act of 1897 and his dependants were receiving compensation under it, they had thereby lost their right to claim damages outside the Act. The Court approved *Edwards* v. *Godfrey* (2) in deciding that proceeding in one mode or the other was conclusive. Mathew L.J. was impressed by the judgment of Holmes L.J. in *Beckley* v. *Scott & Co.* (3) In *Cribb* v. *Kynoch* (4) the workman made a written claim for compensation on which no proceedings took place, then he brought common law proceedings which failed, but brought them too late to be able to ask for compensation under sub-s. 4, and then brought independent proceedings for compensation. It was held that he was barred from such proceedings. Cozens-Hardy M.R. followed *Edwards* v. *Godfrey* (2) and adopted the judgment of Holmes L.J. in *Beckley* v. *Scott & Co.* (3), rather than the judgment of the majority. Buckley L.J. says (5): "The workman in this case did not bring an action within the six months, but commenced one on March 13, 1906. In so doing she (6) was affirming that the employer was under common law liability. From that moment she could not, I think, be heard to say that s. 1, sub-s. 2 (*b*), did not apply. Had she, on March 14, 1906, or subsequently, sought to go on with her proceedings under the Act, the provisions of s. 1, sub-s. 2 (*b*), would have been available to the employer as an answer to her prosecuting both sets of proceedings. . . . . It was impossible for her

(1) [1904] 1 K. B. 838.
(2) [1899] 2 Q. B. 333.
(3) [1902] 2 I. R. 504.
(4) [1908] 2 K. B. 551.
(5) [1908] 2 K. B. 560.
(6) Where a workman who had been injured is dead, any reference to a workman includes a reference to any person to whom compensation is payable: Act of 1906 s. 13.

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while prosecuting her action to affirm at the same time that she was in a position to go on with her proceedings under the Act. It remains, however, to consider whether the right to continue the proceedings under the Act was thereby finally precluded or was only suspended. In my opinion it was finally precluded." The Lord Justice obviously thinks that issuing a writ is "taking proceedings," and that a writ and a request for proceedings on two following days could not be allowed to stand.

Up to this time, the divergence from this line of authority in England was in two decisions of the Divisional Court, in both of which Lord Alverstone C.J. and Wills J. were concerned. In *Isaacson's* case (1) the Divisional Court held that applying for compensation under sub-s. 4, and failing, did not bar the workman from appealing from a decision against him under the Employers' Liability Act. The Court, I think, legislated to get over the difficulty about appeals which has now been rectified by the Act of 1923. In my view the subsequent decision of this Court in *Neale's* case (2) on substantially the same facts overrules *Isaacson's* case. (1) The Court of Appeal followed and, I think, approved of the reasoning in *Edwards* v. *Godfrey*. (3) The other Divisional Court decision is *Rouse* v. *Dixon* (4), where the workman brought an action under the Employers' Liability Act, to which it was pleaded that the building was less than thirty feet high; the workman then "withdrew his action," and on the day fixed for hearing was ordered to pay the costs. He then made a claim for compensation. The Court approved the judgment of the majority in *Beckley* v. *Scott* (5) and declined to stop his claim.

In this state of the authorities *Harrison's* case (6) came before the Court. The case actually turned on the effect of asking for compensation in an unsuccessful action at common law, without prejudice to an appeal in such an action. In my view the whole Court declined to follow the

(1) [1903] 1 K. B. 539.
(2) [1906] 2 K. B. 558.
(3) [1899] 2 Q. B. 333.
(4) [1904] 2 K. B. 628.
(5) [1902] 2 I. R. 504.
(6) [1922] 2 K. B. 674.

reasoning of the majority in *Beckley* v. *Scott.* (1) Lord Sterndale M.R., after citing *Edwards* v. *Godfrey* (2); *Neale's* case (3); and *Cribb* v. *Kynoch* (4) continued (5): "These cases to my mind make it clear that the intention of the Legislature was . . . . that the workman apart from the procedure provided for his benefit in sub-s. 4 should be entitled to claim against his employer by one procedure and by one only"; and he declined to follow *Beckley* v. *Scott* (1); *Isaacson's* case (6); or *Rouse* v. *Dixon.* (7) Warrington L.J. held he was bound by *Neale's* case (3) and declined to follow *Beckley* v. *Scott.* (1) After referring to the cases I said (8): "These decisions of the Court of Appeal bind me to hold certainly, that an action brought to judgment in the first Court, either successfully or unsuccessfully"—(this, I think, is clearly established, and to my mind negatives the view taken by some of the Scotch and Irish judges that it makes any difference whether the applicant fails because he is not, or fails although he is, a "workman" or "dependant" within the Act)—"and, I think, that proceedings commenced in an action prevent the workman from starting concurrent proceedings for compensation except in the manner provided by sub-s. 4." I said "I think" because this is not so clear as the first proposition, but on reconsideration I think it is right. In my view it has been so decided by the judgment in *Edwards* v. *Godfrey* (2), the language of Buckley L.J. in *Cribb* v. *Kynoch* (4), and the approval of the judgment of Holmes L.J. and rejection of the judgment of the majority in *Beckley* v. *Scott* (1) by a number of the judges of the Court of Appeal.

The matter may be tested in this way. If a workman on the same day issued a writ in the High Court and made a claim for compensation in the county court, would the Court as in *King's* case (9) stay the action requiring him to elect on which he would proceed? If they would, and in my

(1) [1902] 2 I. R. 504.
(2) [1899] 2 Q. B. 333.
(3) [1906] 2 K. B. 558.
(4) [1908] 2 K. B. 551.
(5) [1922] 2 K. B. 687.
(6) [1903] 1 K. B. 539.
(7) [1904] 2 K. B. 628.
(8) [1922] 2 K. B. 698.
(9) 1924 S. C. 167; 17 B. W. C. C. 324.

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opinion they would, it would be because, in the words of Holmes L.J., by reason of the statutory provisions the employer is not to be subjected to two sets of proceedings (1), and the view that the workman need not elect till he asks for a final decision was erroneous. Buckley L.J. in *Cribb* v. *Kynoch* (2) treats a writ on one day as barring a claim for compensation on the next day. Or the question may be tested by the words of the statute. Is "issuing a writ" "taking proceedings"? It seems to me it clearly is. I do not feel able to read in the words "which are brought to a decision on the merits."

Another argument was that though the workman took proceedings and made a claim, he was not barred till he did an act by which he conclusively elected with full knowledge of the facts which course he intended to pursue. The force of this argument seems to me to turn on the nature of the option. If it were between starting from London to Peterborough (to the North) or Brighton (to the South) it seems to me impossible to say that you would not exercise the option by starting, but only when you got to Peterborough or Brighton. So where A. could be sued on the original contract, and B. only on a novation which released A. and made B. liable, Lord Blackburn in *Scarf* v. *Jardine* (3) thought that issuing a writ against B. was a conclusive election. Where there are alternative remedies against two, A. and B., the issuing of one writ against both will not be an election to sue either, and the writ will not be struck out, because there is no statutory prohibition of proceedings against both, but taking judgment against the one will release the other: see per Collins M.R. in *Morel & Co.* v. *Earl of Westmoreland.* (4) But here there is in my view a statutory provision against double proceedings; they will not be allowed to go on concurrently. Except in so far as sub-s. 4 allows them, taking one proceeding therefore is a conclusive election and bars the other. The employer is not to be subjected to double proceedings. I do not think you can

(1) [1902] 2 I. R. 533.
(2) [1908] 2 K. B. 551, 560.
(3) 7 App. Cas. 345, 362.
(4) [1903] 1 K. B. 64, 77.

escape the statutory prohibition against doing a thing by saying that, though you have done it, you have not elected to do it. If by statute you have an option to do A or B, but not both, and you have done A, it does not seem to me relevant to say "I have done A, but I have not elected to do it." Unless it can be said that you do not take proceedings when you issue a writ and serve it on the defendant, I think you have elected to do what you have in fact done, and cannot take the other alternative.

Dealing with the facts of this particular case, first, I do not think the proceedings against the third party have any relevance. Under the Act of 1897 they would have been relevant, for by s. 6 of that Act the workman could not proceed both against his employer and a third party; but under s. 6 of the Act of 1906 he can take both proceedings. Secondly, under the County Court Order IX., r. 1, sub-s. 2, discontinuance of an action is not a defence to a subsequent action, but this does not affect other statutory defences. For instance, discontinuance of an action at common law brought within six months of the accident will not enable compensation under sub-s. 4 to be asked for in a second common law action brought more than six months after the accident. When the workman here brought his action at common law, in which he could under sub-s. 4 ask for compensation, he in my view elected that form of procedure; he could on submitting to judgment against him at common law have got compensation under the statute, and if he does not choose to take that course, he cannot subsequently start a fresh arbitration for compensation. To do so would be to expose the employer to double proceedings, which it is the object of the statute to prevent.

For these reasons I think the county court judge came to a correct conclusion both as to the effect of previous decisions of this Court, and on the true construction of the statute, and that the appeal should be dismissed with costs.

ATKIN L.J. There have been so many conflicting opinions expressed on the meaning of s. 1, sub-s. 2 (*b*), of the Workmen's

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Compensation Act, 1906, and the corresponding section, also s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1897, that it may be permissible to indicate how one might view the section unassisted by the multi-coloured lights of the decisions. I should have come to the conclusion that the first words of the clause governed the entire operative part, and that it was only where the employer was in fact liable at common law to the workman that any question of an option arose. "In that case" I should have thought can only mean "Where the injury was caused by the personal negligence," etc. The result would be that the workman would have an option between two real liabilities of his employer, and not between two chances of liability. But such a view is precluded in this Court by the decision in *Cribb* v. *Kynoch* (1), where Cozens-Hardy M.R. says: "The language of that sub-section is not very happy, for it admits of the construction that it has no application unless in fact the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible. And it has been established here that there was no such negligence or wilful act. Nevertheless I think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail, and then proceed by common law action, and also cannot proceed by common law action and, having failed in that action, then proceed under the Act." I think that the same view is assumed in both *Edwards* v. *Godfrey* (2) and *Harrison* v. *Wythemoor Colliery Co.* (3) If I were allowed to follow my own unaided and therefore erring judgment, I should be inclined to think that the section after declaring that nothing in the Act was to affect any civil liability of the employer, meant what it said, and only intended to protect the employer from paying compensation twice over under two alternative liabilities. With the assistance, however, of the above mentioned authorities, I know that this is not the meaning of the section in England. As the workman's rights are therefore cut down

(1) [1908] 2 K. B. 551, 555; 1 B. W. C. C. 43, 45.

(2) [1899] 2 Q. B. 333.

(3) [1922] 2 K. B. 674.

to something less than the right to receive compensation twice over, one has to examine the restrictions so far as they are determined by authority. Has he to elect between proceedings, and is his election determined once he has commenced either proceeding? On this question I would desire to call attention to the words, "The workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act." If the words mean that, while he has the option to do one of two things, as soon as he does one he may never thereafter do the second, it is not immaterial to notice that the first choice is to "claim compensation." It is well known that up to 1900 the word "claim" in the Act had been treated as meaning "file a request for arbitration," and that the decision to the contrary of the House of Lords in *Powell* v. *Main Colliery Co.* (1) made an important change in the law as understood up to that date, and has to be remembered in dealing with relevant cases decided before that date. It is true that the House of Lords was dealing with "the claim for compensation" under s. 2, sub-s. 1, of the Act of 1897; but it could hardly be contended that the word bears different meanings in s. 1, sub-s. 2, and in s. 2, sub-s. 1. "Claim compensation" therefore means intimate a claim to the employer. Such intimation may be written or verbal, and may be evidenced by proof that the employer has in fact paid compensation: *Lowe* v. *Myers & Sons.* (2) The option, therefore, is either to give notice of claim for compensation or to take proceedings independently of the Act. It certainly seems remarkable that though the common law liability is not to be affected by the Act, yet if the injured workman takes the ordinary course after an accident of making a claim for his weekly payment of compensation he irrevocably loses his rights at common law, even though he may be entirely ignorant of the defect in the ways, works, etc., or of the breach of statutory duty, which may be the foundation of his cause of action. The point arose in *Cribb* v. *Kynoch.* (3) There the workman

(1) [1900] A. C. 366. (2) [1906] 2 K. B. 265.
(3) [1908] 2 K. B. 551.

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had given what in the Law Reports is called a "Notice of the accident and of a claim for compensation." No request for arbitration was made within six months; and about a year after the accident a common law action for negligence was commenced against the employer. This ultimately failed on appeal on a question of common employment. The workman then filed a request for arbitration under the Workmen's Compensation Act. The county court judge made an award in favour of the workman, which the Court of Appeal reversed on the ground, as expressed by the Master of the Rolls, that a workman "cannot proceed by common law action and, having failed in that action, then proceed under the Act." The Court of Appeal cannot have thought that once either of the two choices was attempted the other became impossible; for in that case a claim for compensation having been made before the common law action, the latter would have been barred, and not the former. Both the Master of the Rolls and Kennedy L.J. refer to the applicant as having originally given notice of a claim for compensation. Kennedy L.J. calls it "a valid initiatory claim." He says (1): "It seems to me that when a decision is given either way the workman must be considered as having made his option, and that such option is final and conclusive. . . . ." I think that this case is not an authority for the proposition that merely making a claim on the one hand, or commencing an action on the other, finally precludes the workman from adopting the other alternative, though I agree that Buckley L.J. obiter does so construe the Act. I should also be led to believe that the initial adoption of either choice was not conclusive by comparing the words of the relevant sub-section, s. 1, sub-s. 2 (*b*), in the Act of 1897, which is unaltered in the Act of 1906, with s. 6 of that Act which has been altered in the Act of 1906. I find in the Act of 1897, s. 6, the same words as to option with the addition, "but not against both." That section runs: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the

(1) [1908] 2 K. B. 563.

employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person." The absence of the prohibition in s. 1, sub-s. 2 (*b*), is noteworthy; and the true meaning of the prohibition is I think expressed in the amending section, s. 6, of the Act of 1906, which says that the workman may take proceedings both against a third party and his employer, but shall not be entitled to recover both damages and compensation. However this may be, I am not prepared to hold that the workman's rights are cut down in the drastic manner suggested, unless compelled by authority; and I can find no authority which makes the one choice conclusive, except in a case where the proceedings chosen have reached a decision. I think that the English decisions compel one in this Court to hold that such proceedings when they have reached a decision are a bar. I do not myself see upon what principle the English cases have proceeded unless it be on the principle of election; and taking that view I tried to apply the principle in *Codling* v. *Mowlem & Co.* (1) The case was decided on the ground that the employer had in proceedings under the Act paid into Court the maximum amount to which he was liable, and that sum had been paid out. I took the view, which was upheld in the Court of Appeal (2), that to sue the employer afterwards at common law was to seek to make him liable to pay compensation "both independently of and also under this Act," which is expressly prohibited, and I personally expressed the view, which I still hold (though assent was reserved by the Court of Appeal), that in the circumstances once the employer had paid the full amount under the Act it was irrelevant whether the plaintiff knew of the fact or not; otherwise the employer might have to pay twice. But I also thought it necessary to deal with the suggested election between a claim under the Workmen's

(1) [1914] 2 K. B. 61. (2) [1914] 3 K. B. 1055.

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Compensation Act and a claim at common law. I need not repeat what I said then. I think that election is a question of fact in each case, and is not a question of law. Further, it is essential to a binding election that it should be made with a full knowledge of the material facts: see *Curtis* v. *Williamson* (1) and per Lord Selborne L.C. in *Scarf* v. *Jardine*. (2) I think it is clear in this case that the learned judge treated the question as one of law and not of fact, and that if there were any evidence of election, the case should be sent back to him for his finding; but on consideration of the facts I find no evidence that the applicant did elect to adopt the common law remedy to the exclusion of his rights under the Workmen's Compensation Act. The evidence seems to me all the other way.

In these circumstances I think that the appeal should be allowed with costs and that the case should be remitted to the county court judge for the compensation to be assessed.

Appeal allowed.

Solicitors for appellant: *C. Butcher & Simon Burns.*
Solicitors for respondents: *Leonard Bingham & Sharp.*

(1) L. R. 10 Q. B. 57. (2) 7 App. Cas. 345, 353.

W. H. G.

NORTHWOOD *v.* LONDON COUNTY COUNCIL.

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Feb. 24, 25;
May 21.

Local Government—Housing—Improvement Scheme—Compulsory Acquisition of Land—Licensed Premises—Compensation—Housing Act, 1925 (15 *Geo.* 5, *c.* 14), *s.* 46, *sub-s.* 1.

Where land upon which there was a fully licensed public house was compulsorily acquired by the London County Council for the purposes of an improvement scheme under Part II. of the Housing of the Working Classes Act, 1890:—

Held, that the Official Arbitrator, in assessing the compensation to be paid for the land and premises under s. 46, sub-s. 1, of the Housing Act, 1925, was not entitled to award to the licensee any sum for trade disturbance, or the loss of the licence, or for the value of the trade fixtures.

Case stated by an Official Arbitrator under s. 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919.

The material facts are stated in the judgment of the Court.

The Arbitrator asked for the direction of the Court whether, in assessing the compensation to be paid for land on which there was a fully licensed public house, and which was being compulsorily acquired by the London County Council for the purposes of an improvement scheme, he was entitled to award to the licensee any sum for trade disturbance, or the loss of the licence, or for the value of the trade fixtures.

Clayton K.C. and *H. G. Robertson* for the claimant referred to the following cases: *Commissioner of Public Works (Cape Colony)* v. *Logan* (1); *Cannon Brewery Co.* v. *Central Control Board (Liquor Traffic)* (2); *Earl Fitzwilliam* v. *Inland Revenue Commissioners.* (3)

William Allen for the London County Council.

Cur. adv. vult.

May 21. Lord Hewart C.J. read the following judgment of the Court (Lord Hewart C.J., Salter and Branson JJ.):—

(1) [1903] A. C. 355.
(2) [1918] 2 Ch. 101; [1919] A. C. 744.
(3) [1913] 2 K. B. 593; [1914] A. C. 753.

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This is a special case stated by Sir Ankers Simmons, an Official Arbitrator, under s. 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919.

The London County Council are carrying out an order of the Ministry of Health sanctioning an improvement scheme made under Part II. of the Housing of the Working Classes Act, 1890, and known as the County of London (Brady Street Improvement Scheme) Order, 1922, and, in pursuance of the powers conferred by that order, have duly served notices to treat for the compulsory acquisition of certain land and premises known as the Freemasons' Arms, 45 Pereira Street, a fully licensed house situate in the metropolitan borough of Bethnal Green. The land was included in the scheme and coloured pink on the map annexed thereto, that colour signifying that the land was not included merely for the purpose of making the scheme efficient. Messrs. Barclay, Perkins & Co., Ld., are mortgagees of the land and premises, but for the purpose of the case may be disregarded. The lessee is George James Northwood under a lease expiring on September 29, 1961, at a rent of 30*l.* per annum. He pays the insurance on the premises, and he is and was at all material times the licensee of the premises. The said George James Northwood claimed that in awarding compensation for the compulsory acquisition of the premises the Arbitrator had power to award him a sum for trade disturbance or the loss of his interest in the licence, or alternatively a sum for the value of the licence as increasing the site value and the value of the trade fixtures.

Now, the measure of compensation to be awarded in cases of this kind is laid down by s. 9, sub-s. 1, of the Housing, Town Planning, &c., Act, 1919, now repealed and re-enacted by s. 46, sub-s. 1, of the Housing Act, 1925 (1), which provides

(1) The Housing Act, 1925, s. 46, sub-s. 1: "Where land included in any improvement or reconstruction scheme made under this Part of this Act or the corresponding provisions of any Act repealed by this Act (other than land included in such a scheme only for the purpose of making the scheme efficient and not on account of the sanitary condition of the premises thereon or of those premises being dangerous or prejudicial to health) is acquired compulsorily, the compensation to

that "the compensation to be paid for the land, including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building by-laws for the time being in force in the district." The points upon which the Arbitrator asks for the direction of the Court are :—

(*a*) Is he entitled to award the claimant, the said George James Northwood, any sum for trade disturbance or loss of his licence ?

(*b*) Is he entitled to award the claimant any sum for trade fixtures ?

(*c*) Is he entitled to award a greater sum than he otherwise would, in respect of the site value of the premises, because a portion of the premises was licensed for the sale of excisable liquors ?

(*d*) If he is not entitled to award any compensation for loss of the licence, can he, apart from any question of the premises being licensed premises, award any sum for trade disturbance or for loss of trade ?

In the opinion of the Court the words "land, including any buildings thereon" in the sub-section under consideration comprise everything which appertains to the premises compulsorily acquired, including fixtures, and the amount of compensation to be paid is "the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building by-laws for the time being in force in the district." This measure of compensation in the case of land which has been included in the scheme on account of the sanitary condition of the premises thereon, or because the premises were dangerous or prejudicial to health, was intended by the Legislature, as it seems to the Court, to be inclusive, and no additional sum may be awarded for trade

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be paid for the land, including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building by-laws for the time being in force in the district."

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disturbance or for loss of trade. As to the licence, it is to be observed that one of the grounds upon which, under s. 18 and the Second Schedule of the Licensing (Consolidation) Act, 1910, the licensing justices may refuse the renewal without compensation of an old on-licence other than an old beer-house licence is that the licensed premises are structurally deficient or structurally unsuitable, and, in the opinion of this Court, nothing may be awarded to the claimant for the loss of his licence. The case of *Earl Fitzwilliam* v. *Inland Revenue Commissioners* (1) was relied upon by counsel for the claimant. But there the question was whether, under a statute (the Finance Act (1909–10) 1910), which charged a duty on "the value of the benefit accruing to the lessor by reason of the determination of" a lease, the fact that the premises were licensed for the sale of intoxicating liquor, and the value of the land, including the buildings, thereby enhanced, was an element to be taken into consideration in estimating such value. That is quite a different case from the present case, and, in so far as it can be considered to afford any assistance, it would seem to be unfavourable to the argument for the claimant, because, as was pointed out by Lord Atkinson, all the advantages obtained by the lessor in connection with the licence on the determination of the lease sprang from his complete ownership possession and occupation of his land with the building on it, and it was therefore impossible to contend that these advantages were not elements increasing the value of the premises. But in the present case the compensation to be paid for the land and buildings is the site value of the land cleared of buildings, and it cannot be said that the advantages derived from the fact of the premises having been or being licensed are elements increasing the value of the site, as distinguished from the land and buildings.

It was strongly urged that the licensed house, as things stand, is in fact there, and that the business is being carried on in it. The statement is true, but may well be a little

(1) [1913] 2 K. B. 593; [1914] A. C. 753, 758.

misleading, inasmuch as the valuer is directed to give compensation on the basis that the property is a cleared site available for lawful development, that is to say, on the basis that the house is not there and that there is no business being carried on on the property. The fact that the vendor of the cleared site is or was the holder of a licence for the sale of drink on buildings formerly existing on the site and that the licence is or was in force seems to suggest similar considerations. The licence does not and never did authorize the sale of drink on a cleared site, and is perfectly valueless in the hands of the owner of a cleared site. If a purchaser of the site were to build a public house on it, it would be necessary for him to obtain a new licence and pay monopoly value. He could not obtain, in those circumstances, a renewal or transfer of the existing licence.

It was also urged and it is manifestly true, that it is for the Arbitrator to determine what facts are material to the issue of the selling value of the cleared site, if there is any evidence on which he can properly find that particular facts are material. But he is not entitled to take into consideration facts which by reason of the provisions of the statute are irrelevant. In the opinion of this Court the facts as to the existence of the house and business and of the licence are irrelevant, for the reason that the statute excludes compensation for the buildings and consequentially for anything, such as a licence to sell drink on the particular premises, which becomes valueless and of no effect apart from the existence of the buildings. In other words, the statute, by limiting the compensation to the selling value of the cleared site, excludes compensation for anything else, and though the suitability of the site for a public house, and for that matter, its suitability for any other kind of enterprise, is of course an element in its selling value, the fact of the existence of a licence, perfectly useless apart from the buildings, which are not the subject of compensation, and which are to be treated as having been cleared away, cannot affect the selling value. To hold the contrary would seem to be tantamount to saying that compensation can be given in a roundabout

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way for goodwill, and that principle, if it were applicable, could not be confined to licensed premises.

There is another provision of the Licensing (Consolidation) Act, 1910, which seems to afford an additional reason for the conclusion we have reached. Sect. 24, sub-s. 2 (*a*), of that Act makes the fact that the premises in respect of which the licence has been granted are or are about to be pulled down or occupied for a public purpose (as is the case here), a " special ground " for an application for the removal of the licence. The claimant could apply under this section for the removal of his licence. It would be odd if at the same time he could get more for his land by reason of the fact that, though the value of it is to be assessed as the value of a cleared site, it is now occupied by licensed premises. If so, he would be paid for his licence, though he still enjoyed this right in respect of it. If it be said that he has not exercised his right, then either he has lost his licence by his own default, or any additional price that a purchaser would pay him because of the existence of the licence is attributable not to the land, but to the claimant's action in not having applied for a removal of the licence. To put the matter in another way this section seems to show that, whatever may be the case in other circumstances, the licence in this case cannot be said to be in any way attached to or to form part of the land. It also destroys the argument addressed to us as to the hardship of depriving a man of his licence without compensation.

For these reasons we are of opinion that all the questions upon which the direction of the Court is asked should be answered in the negative.

Solicitors for the claimant : *Marson & Toulmin.*

Solicitor for the London County Council : *D. P. Andrews.*

F. C.

Referred to. HUTCHINSON *v.* JAUNCEY [1950] 1 K. B. 574

Distinguished. JOHN M. BROWN LD. *v.* BESTWICK [1951] 1 K. B. 21

LESLIE AND COMPANY, LIMITED *v.* CUMMING AND OTHERS.

1926
April 27;
May 7.

Landlord and Tenant—House let unfurnished—Whole House sublet furnished—Occupation of Sub-Tenant ended before Proceedings to recover Possession commenced—Part of House subsequently sublet furnished—Claim by Landlords to recover Possession of whole House—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5, *s.* 12, *sub-s.* 2, *proviso* (*i*).

In November, 1918, a flat was let by the plaintiffs to the defendant for a term of three years at a rent which brought the flat within the Rent Restriction Acts. After the expiration of the three years' term at Michaelmas, 1921, the defendant remained in possession as a statutory tenant. In August, 1922, the defendant let the whole flat furnished to M. for a year. In October, 1923, the defendant again let the whole flat furnished to W. After that subletting had expired the defendant's agent in May, 1925, sublet a portion of the flat furnished to S. On November 2, 1925, while the sub-tenancy to S. was in existence, the plaintiffs commenced proceedings for the recovery of possession of the whole of the premises :—

Held, that the plaintiffs were not entitled to succeed, as the fact that the whole of the premises had been sublet furnished for a period which had expired before the commencement of the proceedings to recover possession of the premises could not be relied upon by the plaintiffs as taking the premises out of the protection of the Rent Restriction Acts, and further that the plaintiffs could not rely upon the subletting of a portion of the premises furnished to S., as they had claimed possession of the whole of the premises.

APPEAL from the West London County Court.

The following statement of facts is taken from the judgment of Roche J. :—

"By a written agreement dated November 23, 1918, the plaintiffs let to the defendant, Mr. R. C. Cumming, a flat at West Kensington, at a yearly rent of 65*l.*, for three years from Michaelmas, 1918. There was a covenant in the agreement that the defendant would not assign, underlet or part with possession of the flat or any part thereof without the plaintiffs' consent in writing first previously had. There was the usual proviso that there was to be no vexatious withholding of consent in the case of a desirable tenant for the whole flat.

"The three years' term expired at Michaelmas, 1921, but

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Robert Charles Cumming remained in possession, and either at that date or at Michaelmas, 1923, when a notice to quit expired, became (to use the convenient phrase) a statutory tenant under the Rent Restrictions Act, 1920. On August 29, 1921, the rent was increased under the provisions of that Act to 98*l.*

"In August, 1922, the whole flat was let furnished by Mr. Cumming to a Mr. Moore for a year. The consent of the plaintiffs was not previously obtained, but they gave their consent in writing on December 1, 1922. In October, 1923, the Cummings again let the whole flat furnished to a Mrs. Willcocks. Again the consent of the plaintiffs was not previously obtained, but it was given in writing on August 29, 1924.

"The defendant R. C. Cumming, owing to his bad health, had left London for Glasgow in October, 1922, to go to a home or institution. Thereafter he was not physically present at the flat, but his furniture remained there and his two daughters, who were made defendants in the action, resided there, except during the subletting to Mr. Moore and Mrs. Willcocks.

"In May, 1925, the defendant's daughters, acting on his behalf, let two rooms in the flat furnished to a Mr. Samad at a rent of 2*l.* 10*s.* a week for the furnished rooms and attendance. Thereupon the parties were in correspondence from May 29 to July 22. The complaint made in the correspondence on behalf of the plaintiff company was that the subletting was a breach of the agreement and entitled the plaintiff company to demand possession. Possession was refused.

"On November 2, 1925, the plaintiff company issued the plaint in these proceedings claiming possession of the whole premises. At some date between the date of the plaint and before the hearing of the action, which took place on December 2, 1925, Mr. Samad left the flat and ceased to be in occupation of the two furnished rooms.

"The learned county court judge entered judgment for the defendants, holding that the premises were subject to the

Rent Restrictions Acts, and that the matter being one for his discretion it was a case in which he did not think it was reasonable to make an order for possession."

The plaintiffs appealed.

Gilbert Stone for the plaintiffs. The defendant Cumming was not entitled to rely upon the protection given by the Rent Restriction Acts, because under s. 15 of the Rent Restriction Act, 1920, a statutory tenant is only entitled to the benefit of the Act so long as he retains possession of the dwelling-house. Cumming had admittedly been away from the flat since October, 1922, as he had been living in Glasgow and therefore had not retained possession of the house within the meaning of s. 15 of the Act of 1920. His two daughters who remained on the premises were no better than trespassers. Further, Cumming sublet the whole of the premises furnished to Mr. Moore in August, 1922, for a year, and subsequently to Mrs. Willcocks, and during those periods the tenant was not in possession of the premises. It was held by Swift J. in *Hicks* v. *Scarsdale Brewery Co.* (1) that the word " possession " in the Act of 1920 means actual physical possession, and that the Act does not apply to protect a tenant in reversion who was in fact the landlord of the tenant in occupation. If the conditions are broken on which the protection of the Rent Restriction Acts depends a subsequent compliance with those conditions will not revive the protection given by the statute : *Evans* v. *Horner.* (2) When the protection given by the statute is once lost it is lost for all time, and cannot be subsequently revived. The Court of Appeal held in *Keeves* v. *Dean* (3) that the right of a statutory tenant under the Increase of Rent Acts to retain possession of the premises is a personal right, and cannot be assigned to another person. If the plaintiffs had brought the action to recover possession during the time the premises were sublet, the action would not have been successful, because the sub-tenants would have been lawfully in possession: *Gidden* v. *Mills.* (4) It was

(1) [1924] W. N. 189.
(2) [1925] Ch. 177.
(3) [1924] 1 K. B. 685.
(4) [1925] 2 K. B. 713.

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held in *Phillips* v. *Barnett* (1) that a house ceases to be within the protection of the Rent Restriction Acts if it loses its identity. Scrutton L.J. expressed the view in *Prout* v. *Hunter* (2) that where a house which had been let unfurnished was sublet furnished it lost its identity so as to cease to be within the protection of the Rent Restriction Acts. These premises therefore ceased to be within the protection of the Rent Restriction Acts by reason of the whole of the premises having been sublet furnished first to Moore and subsequently to Mrs. Willcocks, and a portion of them being afterwards sublet furnished to Mr. Samad. It was held in *Prout* v. *Hunter* (3) that it was necessary to look at the occupying tenant and at the nature of his occupation in order to see whether the premises are outside the protection of the Act. That case is only expressed to apply to a case where the action for possession is brought during the period of subletting, and leaves open the question whether after the expiration of the furnished subletting the premises come back within the protection of the Acts. If the protection of the Acts is once lost it is lost for ever. At any rate, when this action was commenced the defendant Cumming was not in possession of the whole of the house, as he had sublet a portion of it furnished to Samad. The plaintiffs are therefore entitled to an order for possession. The county court judge ought not to have exercised his discretion in favour of the defendants. The omission of the defendant to ask the plaintiffs' consent for permission to underlet the premises was not a mistake in respect of which the Court could give relief against forfeiture for breach of the covenant: *Barrow* v. *Isaacs & Son.* (4) Further there was no evidence of any hardship which would entitle the county court judge to exercise his discretion under the Rent Restriction Acts and give relief.

The defendants did not appear. *Cur. adv. vult.*

May 7. ROCHE J. This is the appeal of the plaintiff company from a judgment of His Honour Judge Sturges sitting

(1) [1922] 1 K. B. 222.
(2) [1924] 2 K. B. 743.
(3) [1924] 2 K. B. 736.
(4) [1891] 1 Q. B. 417.

at the West London County Court. The action was an action by the landlords for possession, and the result was that judgment was entered for the defendants. The ground of such decision in the defendants' favour was that the Rent Restriction Act applied to the case and to the premises.

The facts are shortly as follows. [His Lordship then read the statement of facts set out above and continued:] On the appeal the defendants did not appear. Mr. Stone for the plaintiffs argued the case with conspicuous fairness as well as ability. Our task in deciding such a case would obviously have been lightened if we had been assisted by counsel for the defendants. It was for this reason that we took time to further consider the matter.

The grounds of the appeal are three-fold: (1.) that upon the facts the defendant Cumming had not retained possession of the demised premises within the meaning of s. 15 of the Rent Restriction Act, 1920; (2.) that upon the facts the premises had ceased to be within the protection of the Rent Restriction Acts, 1920 and 1923, because they had ceased by reason of the furnished subletting to be premises to which the Acts apply (see proviso 1 to s. 12, sub-s. 2, of the Act of 1920); and (3.) that in any case the learned judge ought not to have exercised his discretion in favour of the defendants, and should have made an order in the plaintiffs' favour.

The first and third of these points seem to present no difficulty. The defendant R. C. Cumming was not, as I have stated, physically present in the flat after October, 1922, but elsewhere for reasons connected with his health. His furniture and family were there, and there was evidence that if the health of R. C. Cumming improved he intended to return. Clearly, therefore, there was evidence on which the learned judge could find, as he did find, that the defendant R. C. Cumming was in possession at the material time, and was, therefore, entitled within the meaning of s. 15 of the Act of 1920 to the benefit and protection of the Act.

As to the third point, that is the point of discretion, it cannot in my judgment be said that there were no grounds on which, if the premises were within the protection of the

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Act, the learned judge could not reasonably think he ought to refuse to make an order for possession. With the exercise of his discretion it is not for this Court to interfere.

The second point is less simple. Mr. Stone contended that the premises ceased to be a dwelling-house to which the Acts applied, first, by reason of the letting of the whole flat furnished to Mr. Moore and Mrs. Willcocks, or, secondly, by reason of the letting of the two rooms furnished to Mr. Samad. In support of his contention he relied upon *Prout* v. *Hunter*. (1) In that case the whole of the demised premises had been let furnished, and were in the occupation of the person who had so taken them at the date of the writ. In the present case, so far as the whole of the demised premises are concerned, they had been let furnished to Mr. Moore and Mrs. Willcocks, but their terms of occupation had ended long before the date of the proceedings. I do not think that the effect of the letting of the whole premises furnished to Mr. Moore and Mrs. Willcocks (with, it is to be noted, the consent of the plaintiffs) was that the premises both became and continued for all time premises to which the Acts of 1920 and 1923 did not apply. In my opinion, at any rate, from the termination of those sub-tenancies Robert Cumming was in possession; his tenancy was a statutory one, and the premises were not let furnished. *Phillips* v. *Barnett* (2) and *Williams* v. *Perry* (3), which were cited to us, no doubt show that a change of structure of a permanent kind or a particular user of premises continuing until action brought may take the premises out of the protection of the Acts. They are not authorities for the proposition that if a tenant is a statutory tenant of premises let unfurnished those premises are not protected because at some period which has expired they were let furnished.

As regards the letting furnished to Mr. Samad, this was in existence at the date on which these proceedings began, and if the whole premises had been let to Mr. Samad, *Prout* v. *Hunter* (1) might have been invoked as showing that the

(1) [1924] 2 K. B. 736. (2) [1922] 1 K. B. 222.
(3) [1924] 1 K. B. 936.

Act no longer applied to the premises. In this case only part, namely, two rooms, were let furnished to Mr. Samad. The plaintiffs' claim is for possession, not of those two rooms, but of the whole premises. By s. 12, sub-s. 2, of the Act of 1920 it is provided that the Act shall apply to a house or part of a house let as a separate dwelling, and then, after the addition of other words immaterial for the present purpose, it goes on: "and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies." Then occurs the proviso as to furnished letting. The contention here is that the application of the Act to the whole of these demised premises is excluded by this proviso as to furnished letting. But the whole of these demised premises were not let furnished; only two rooms were so let. It may be that in accordance with the reasoning in *Gidden* v. *Mills* (1), which follows and applies *Prout* v. *Hunter* (2) and *Phillips* v. *Hallahan* (3), the plaintiffs, if they had claimed possession of the two rooms let to Mr. Samad, might have succeeded. It is, however, unnecessary to decide that point. The plaintiffs' claim was for possession of the whole premises, and it does not appear to have been suggested in the Court below, and certainly was not suggested in this Court, that the plaintiffs either desired or claimed possession of the part formerly let to Mr. Samad without the rest of the flat.

For the reasons I have given, in my opinion, the contention of the plaintiff company as to the premises taken as a whole fails, and the county court judge was right on this point also.

For these reasons I think this appeal should be dismissed with costs.

MACKINNON J. I agree. If one analyses the position I think it is this. The plaintiffs say: We are freeholders of these premises and claim possession; you who are in occupation have no right to be there. The defendants' answer is: We had an agreement of lease which expired by effluxion of time in 1921; this under s. 12, sub-s. 2 (*a*), of the Rent

(1) [1925] 2 K. B. 713. (2) [1924] 2 K. B. 736.
(3) [1925] 1 K. B. 756.

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MacKinnon J.

Restriction Act, 1920, is a house in the Metropolitan police district of less than 105*l.* a year value, and therefore by s. 5, sub-s. 1, of that Act in the discretion of the learned judge no order for possession of that dwelling-house should be made. The plaintiffs in rebutting that contention seek to rely upon the proviso to s. 12, sub-s. 2, of the Act, which provides that notwithstanding that enactment the Act shall not apply to a dwelling-house bona fide let furnished, and a dwelling-house in that proviso must mean, by virtue of the definition which immediately precedes it, a dwelling-house or part of a house let as a separate dwelling. In order to show that these premises come within that proviso as regards being let furnished, the plaintiffs rely upon *Prout* v. *Hunter* (1) in relation to either the letting to Mr. Samad or the letting to Mrs. Willcocks and Mr. Moore. Now as regards the letting to Mr. Samad I agree with what has been said by my learned brother, that the plaintiffs must fail because they are claiming possession of the dwelling-house which is the whole dwelling-house, and not of the dwelling-house which is part of the premises let separately.

As regards the previous letting to Mrs. Willcocks and Mr. Moore, whose occupation had come to an end long before proceedings had been taken in this action, I agree that the time at which one has to consider whether a dwelling-house is a dwelling-house subject to the protection of the Act, is the date of the writ or, in this case, the plaint in the county court. I do not suppose that Mr. Stone would have sought to argue that *Prout* v. *Hunter* (1) went as far as to apply in a case where the dwelling-house had been let furnished during the currency of the original lease, say in 1919 or 1920, but he does seek to say that a letting furnished for, I suppose, however short a period after the tenant became a statutory tenant took the house out of the category of a protected house and put it into the category of an unprotected house. It is only necessary to consider what startling results that contention would lead to in order to see that that argument must be wrong. For instance, if there be, as well there

(1) [1924] 2 K. B. 736.

may be, a person in occupation of a house at Henley-on-Thames as what is called a statutory tenant, and supposing the owner of that house discovered that the statutory tenant let the premises furnished for the regatta week in 1922, could he now, by virtue of that use of the house for a week four years ago, come to the Court and say: Give me possession of the premises, because by virtue of that temporary subletting so long ago the premises ceased to be protected? I am far from saying that because you find that some contention under these Acts leads to an extraordinary result that therefore that cannot be the effect of the Act, because the Acts are so worded that extraordinary results of one kind and another do follow; but I think those considerations assist in leading one to the conclusion, with which I agree, that the fact that a house has been let furnished for a period which has expired before proceedings are commenced cannot be relied upon as taking the house out of the protection of the Act in the way which is suggested.

For these reasons I entirely agree with my brother. I think the appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Shepheards, Walters & Bingley.*

R. F. S.

Followed. PARMEE *v.* MITCHELL [1950] 2 K. B. 199

Approved. PARMEE *v.* MITCHELL. [1950] 1 All E.R. 872.

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May 19, 20.

THOMPSON *v.* ROLLS.

Landlord and Tenant—Dwelling-house reasonably required by Landlord for Occupation as a Residence—Part of House only required by Landlord—Refusal by Tenant to give Possession—Claim of Landlord to whole House—Alternative Accommodation—Tenant offered same Accommodation in the House she already occupied—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4, *sub-s.* 1 (*d*).

The defendant, who was the tenant of a seven-roomed house, occupied five of the rooms herself and sublet the remaining two rooms furnished. The plaintiff, who urgently required some rooms in which to reside together with her mother and niece, bought the house in September, 1924, and asked the defendant to give her possession of the two rooms she sublet furnished, and offered to allow the defendant to retain possession of the five rooms she occupied in the house. The defendant, however, refused to give the plaintiff possession of the two rooms. The plaintiff thereupon served upon the defendant a notice to quit the whole of the premises, and subsequently commenced proceedings in the county court under s. 4, sub-s. 1 (*d*), of the Rent Restriction Act, 1923, claiming possession of the premises, alleging that she required them for occupation for a residence for herself, and that she had offered the defendant reasonable alternative accommodation. At the trial the plaintiff said that she was prepared to take the two rooms. The county court judge made an order for possession of the two rooms which the defendant sublet furnished on condition that the rent payable by the defendant was reduced. The defendant appealed:—

Held, that in the circumstances, inasmuch as the defendant had refused to give the plaintiff possession of the two rooms, the plaintiff had proved that she reasonably required the whole premises for occupation as a residence for herself within s. 4, sub-s. 1 (*d*), of the Act of 1923, that the offer by the plaintiff to allow the defendant to retain the five rooms she occupied in the house was an offer of alternative accommodation reasonably suitable to the needs of the tenant, even although the alternative accommodation was in the same house, and that therefore the plaintiff was entitled to an order for possession of the whole premises, subject to her allowing the defendant to occupy at a reduced rent the five rooms which she already occupied.

APPEAL from Wandsworth County Court.

The defendant, Miss Rolls, was the tenant of No. 106 Elborough Street, Southfields, where she had lived with her two nephews since June, 1910. The house contained seven rooms, of which the defendant herself occupied five and sublet the remaining two rooms furnished for 1*l.* 1*s.* a week. The defendant paid 19*s.* 6*d.* a week rent.

The plaintiff, Mrs. Thompson, purchased the house in

September, 1924. She carried on the business of a provision dealer in a lock-up shop, and as she urgently required some rooms in which to reside, together with her aged mother and niece, she bought the house, as the agent told her that she could have possession of the two rooms which the defendant sublet. After the plaintiff purchased the house she told the defendant that she required the two rooms for her own occupation which the defendant sublet, but the defendant refused to allow the plaintiff to have the two rooms except as furnished rooms.

The plaintiff thereupon served a notice to quit upon the defendant, and subsequently commenced proceedings in the county court, claiming possession of the premises, alleging that she required the premises for the use and occupation of herself and her aged mother, and that she had offered the defendant reasonable alternative accommodation.

The plaintiff's solicitor had previously written to the defendant's solicitor stating that the plaintiff would be perfectly satisfied with possession of the two rooms which were let furnished by the defendant, and further that she was prepared to allow the defendant suitable alternative accommodation in the house; in other words, the alternative accommodation would be the actual amount of accommodation which the defendant had at present.

At the trial the plaintiff said that she was prepared to take the two rooms which the defendant sublet furnished. The defendant said that all she had to live on was letting the rooms furnished, and that she did not want the plaintiff there to dictate to her.

The county court judge made an order for possession, to take effect in four months, and to be confined to the two rooms at 106 Elborough Street, which were let furnished by the defendant, subject to the condition that the rent payable by the defendant to the plaintiff be reduced to 9*s.* 6*d.* per week.

Frank Powell for the tenant. The county court judge had no jurisdiction to make an order for possession of part

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of the premises. By making the order he did he was creating a new contract between the parties and altering the rent. The question whether the Court has power to make an order for part possession was touched upon in *Salter* v. *Lask* (1), and such an order was made in *Gidden* v. *Mills* (2), but the facts there were quite different from those in the present case. There the premises consisted of a dwelling-house and a garage; the tenant himself separated them into two distinct entities, and the garage was being used solely for business purposes and so was not within the protection of the Acts. Further, nothing in the shape of alternative accommodation was offered to the tenant for the rooms of which she has been deprived; and there was no evidence that the premises—namely, the whole house—were reasonably required by the landlord.

Salter Nichols for the landlord. The county court judge had to be satisfied (*a*) that she reasonably required possession of the premises, and (*b*) that alternative accommodation was available either elsewhere or in the same house. In the present case the whole of the dwelling-house was reasonably required by the landlord, having regard to the fact that there were three in family, and therefore the provisions of s. 4, sub-s. 1 (*d*), of the Act of 1923 (3) have been complied with. If a landlord recovers the whole of a dwelling-house by a misstatement or concealment of a material fact and then sublets a portion of the premises, the tenant against whom the order

(1) [1923] 2 K. B. 798; [1924] 1 K. B. 754.

(2) [1925] 2 K. B. 713.

(3) Rent and Mortgage Interest Restrictions Act, 1923, s. 4, sub-s. 1: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . . .

"(*d*) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself . . . . and . . . . the Court is satisfied that alternative accommodation is available which is reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent, character, and proximity to place of work and which consists either of a dwelling-house to which this Act applies, or of premises to be let as a separate dwelling on terms which will afford to the tenant security of tenure reasonably equivalent to the security afforded by this Act in the case of a dwelling-house to which this Act applies."

for possession was made can come to the Court and recover damages under s. 4, sub-s. 7, of the Act of 1923. In this case the landlord was forced to claim possession of the whole of the dwelling-house, as the tenant would not agree to the landlord having possession of part of the house. The obligation as to providing alternative accommodation is much less arduous under the 1923 Act than under the 1920 Act. Under the 1920 Act the alternative accommodation had to be reasonably equivalent as regards rent and suitability in all respects, while under the 1923 Act it is only necessary that the alternative accommodation should be reasonably suitable to the means and needs of the tenant. In the present case the alternative accommodation which was offered to the tenant consisted of the same rooms which the tenant herself occupied at that time. The county court judge had power to make an order for possession of part of the premises, and he had also power under s. 12, sub-s. 3, of the 1920 Act to apportion the rent, or under s. 11 of the Act of 1923 to determine summarily any question as to the amount of the rent that was payable.

[ROWLATT J. It is not an apportionment of rent; the county court judge has made an order for possession of the whole house, subject to the condition that the landlord lets five rooms to the tenant at 9*s.* 6*d.* a week rent.]

The decision of the county court judge can be supported apart from s. 4, sub-s. 1 (*d*), of the 1923 Act. Any part of a dwelling-house that is separately let is under s. 12, sub-s. 2, of the 1920 Act deemed to be a dwelling-house to which the Act applies. The tenant carved a dwelling-house out of the dwelling-house let to her by subletting two rooms furnished, and those two rooms thereby ceased to be protected by the Acts: *Prout* v. *Hunter* (1), and the landlord was therefore entitled to claim possession of those two rooms: *Salter* v. *Lask* (2), where McCardie J. said: "I can therefore see no reason why the plaintiff should not bring an action to recover a part of the premises which he has demised to the defendant."

(1) [1924] 2 K. B. 736. (2) [1923] 2 K. B. 798, 801.

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That part of the decision of the Divisional Court was affirmed by the Court of Appeal. (1)

Frank Powell in reply. There is no machinery in the Rent Restriction Acts for the purpose of dividing the premises and apportioning the rent: *Ellen* v. *Goldstein*. (2) The county court judge was satisfied that the plaintiff reasonably required only part of the premises and not the whole of the premises. As there was no evidence that the plaintiff required the whole of the premises no order for the possession of the whole of the premises could be made. Under s. 5, sub-s. 1 (*f*), of the 1920 Act a county court judge has power to make an order for possession in a case where the landlord became landlord after service in His Majesty's forces during the war, and requires the house for his personal occupation, and where he offers the tenant accommodation on reasonable terms in the same dwelling-house. The fact that that express power has been given shows that an order for possession on those terms cannot be made in any case other than that specified in the sub-section. The county court judge was not entitled to make an order for possession of the whole of the premises with a condition attached that the landlord should allow the tenant to hire five rooms at a certain rent. The only condition that can be attached to an order for the recovery of possession of a dwelling-house is one under s. 5, sub-s. 2, of the Act of 1920, with regard to the payment by the tenant of arrears of rent. The county court judge had no power to attach to the order for possession a condition dividing up the dwelling-house. An apportionment of rent can only be made on an originating motion under s. 12, sub-s. 3, of the 1920 Act, and not on a claim for possession under s. 5 of the 1920 Act. There was no evidence that the part of the house which was sublet furnished by the tenant was let as a separate dwelling-house. Two rooms cannot by themselves constitute a separate dwelling; there must in addition be sanitary arrangements and conveniences for cooking and washing.

In *Leslie & Co.* v. *Cumming* (3), where the tenant had,

(1) [1924] 1 K. B. 754. (2) [1920] W. N. 253.
(3) Ante, p. 417.

at the commencement of the proceedings for recovery of possession, sublet a portion of premises furnished, the Divisional Court held that the landlords were not entitled to recover possession of that portion, as they had claimed possession of the whole of the premises.

[WRIGHT J. referred to *Gidden* v. *Mills* (1), where an order for the possession of part of the premises was made.]

In that case the plaintiff, besides claiming the whole of the premises, claimed in the alternative possession of the premises which had been separated from the portion of the premises let as a separate dwelling-house, and which were used solely for business purposes. The cases referred to by McCardie J. in *Salter* v. *Lask* (2) in support of the proposition that a landlord can bring an action to recover part of the demised premises are not cases of landlord and tenant, and therefore do not assist. The alternative accommodation must be available when the order for possession is made. If the county court judge made an order for possession of the whole of the premises, it was an order that could not validly be made, as there would be some period of time during which alternative accommodation in that house would not be available for the tenant. The onus lies on the landlord to satisfy the Court that alternative accommodation is available before the order for possession is made: *Nevile* v. *Hardy*. (3)

ROWLATT J. In this case the plaintiff, who was a woman of small means, bought a seven-roomed house, as she says, with the intention of living in it. The defendant was tenant of that house to the vendor. She occupied five of the seven rooms herself and sublet the remaining two rooms furnished. The plaintiff's family is such that she can get into two rooms, and probably does not absolutely require more. Ex hypothesi the defendant does not require more than five rooms, as she does not herself occupy more than five rooms and lets off the remaining two rooms. Therefore, here is a seven-roomed house, with the owner wanting two rooms for her own

(1) [1925] 2 K. B. 713. (2) [1923] 2 K. B. 801.
(3) [1921] 1 Ch. 404.

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occupation, and the tenant wanting five rooms for her occupation, and prima facie one would think there was room for both in the house. But the reason why the defendant objects to that arrangement is that she makes a profit out of letting the two rooms. It is quite clear that this case is outside the mischief which the Rent Restriction Acts were intended to remedy. It is not a case of an unfortunate tenant being turned out of the only accommodation she can get; it is a case of an owner being kept out of rooms which the tenant does not want herself to occupy, but out of which she makes a profit.

The county court judge has made an order for possession of two rooms, and says that the tenant is entitled to keep the other five rooms at a rent of 9*s.* 6*d.* a week. I doubt whether that order is correct in form, but in substance it is quite right.

What is the position? The plaintiff, as landlord, has given the defendant notice to quit the whole of the premises, and at common law she is entitled to recover the whole of the premises. She brings her action to recover possession of the premises, but is confronted with this difficulty created by the statute. Non constat the defendant would raise the statute. Under the statute the plaintiff must prove two things. First, she has to prove that the dwelling-house is reasonably required for occupation as a residence for herself or for some person bona fide residing with her. The plaintiff has only proved that she wants the two rooms, and it is said by the defendant that the plaintiff has not complied with the requirements of the statute and proved that she reasonably requires the premises; but what she has proved is that she requires two rooms in that house, and I am not at all certain that that is not sufficient evidence in the circumstances that she reasonably requires the whole house. The plaintiff told the defendant that she wanted the two rooms for her own occupation, and the defendant said that the plaintiff could not have the two rooms. The defendant thereby put upon the plaintiff the obligation of saying that she requires the seven rooms, and then the defendant says that the plaintiff has not proved

that she wants them. The plaintiff's answer is that if she cannot have the two rooms without obtaining an order for possession of the seven rooms, then she reasonably requires the seven rooms in order to get possession of the two rooms. The county court judge has not found in terms that the plaintiff requires the seven rooms, but I think that when the county court judge found that the plaintiff required the two rooms that, having regard to the circumstances, in substance he found the only fact necessary in order to comply with the requirements of the section.

The next thing the plaintiff has to prove is that there is alternative accommodation available for the defendant. Ex hypothesi the plaintiff is getting possession of the whole house, but eo instanti it appears that the defendant can have the five rooms that she now occupies at a rent which the learned county court judge has found to be reasonable. Why is not that alternative accommodation? I think it is. It is true that the alternative accommodation is not in another house, but the defendant gets the same five rooms in the house which she is now occupying. I do not see why that is not alternative accommodation. But it is ingeniously argued for the defendant that there is a moment of time when she has not got it, but I think that argument is too metaphysical. I think the fraction of time is too minute to be comprehended.

Another ingenious point put forward by counsel for the defendant was that the learned county court judge has apportioned the rent, and that the Rent Restriction Acts provide no machinery for apportioning rent upon an application for possession. I do not think there has been an apportionment. I think the order should be that the plaintiff recovers the whole house, but subject to the condition that she undertakes that the defendant shall have five rooms at a reasonable rent—namely, 9*s.* 6*d.* a week. That is not a condition except in the sense that it is imposed to demonstrate the availability of the alternative accommodation. The position is that the tenant has secured an undertaking from the court that she shall have alternative accommodation at a reasonable rent, and therefore the requirement of the statute that the tenant

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should have alternative accommodation has been complied with.

It has been said, again very ingeniously, that this kind of order could not have been within the contemplation of Parliament, because when you look at s. 5, sub-s. 1 (*f*), of the 1920 Act there is a special provision in favour of a landlord who had become landlord after service in any of His Majesty's forces by which such a landlord can get into his house on these very terms—a provision which shows that it is in that case only that such an order can be made. But I do not think that argument is sound in itself, because the sub-section says, "such accommodation being considered by the court as reasonably sufficient in the circumstances," leaving it absolutely in the discretion of the court to do what is reasonable in the circumstances. That is an improvement in the law in favour of a landlord who has served in His Majesty's forces over the general law, because according to the law as it stood then the alternative accommodation under (*d*) had to be "reasonably equivalent as regards rent and suitability in all respects." Therefore there was reason in the framework of the Act as it then stood for putting in sub-s. (*f*) in favour of members of His Majesty's forces.

Another point taken for the defendant is that the order of the county court judge will lead to hopeless difficulties, because the court ought not to give the landlord the right to share the common conveniences of the house with the tenant. That argument is based upon a misconception. What the court is deciding is that the landlord becomes possessed of the whole house and offers a tenancy of the five rooms to the defendant. But the defendant need not accept that offer. If she does accept it she will become tenant of the five rooms to the plaintiff. She is not in the position of remaining there as statutory tenant. She will stay there because of the exercise by her of the rights which the landlord undertakes to give her.

One of the points taken for the plaintiff was that these two rooms were sublet furnished as a separate dwelling-house, and therefore they became a separate dwelling-house, which was unprotected under the Rent Restriction Acts, and

that an order for the possession of that smaller dwelling-house could be made, so that the defendant would be left with the five rooms, and that the county court judge had the right to apportion the rent as to the five rooms. I express no opinion upon this point, because it was not taken before the county court judge, and no question as to the amount of the rent which could be attributed to the furniture was put in the county court. I express no opinion whether or not the court has power in this action to apportion the rent. It may be doubtful whether rent can be apportioned.

I think therefore that this appeal must be dismissed.

WRIGHT J. I agree. I do not desire to add much to what my brother has said in this case. I agree that it would be a most lamentable result if the plaintiff were unable to obtain the relief she seeks. She has a common law right to obtain possession of this house. She bought the house in order to get some accommodation in which to live, and with the knowledge that the existing tenant had actually sublet two rooms in the house, and with the hope and intention of taking those two rooms from the defendant, leaving the defendant with the remaining five rooms. The defendant most unreasonably has refused to come to any arrangement, and has left the plaintiff to rely upon her strict rights.

I agree that the order which the county court judge has made ought to be reframed as a matter of form and not as a matter of substance. There is some doubt as to the exact finding of the county court judge on the question what the plaintiff has established in respect of requiring the premises for her own occupation—namely, whether she proved that she required part of the premises or the whole of the premises—but I do not attach much importance to this. I think the substance of the county court judge's finding was that the plaintiff desired to occupy two rooms, and two rooms only, in the house, but being met by the position taken up by the defendant, could only obtain the occupation of those two rooms by obtaining the possession of the whole house. If she obtained the possession of the

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whole house then she could use that possession, first, by providing for her own requirements, by occupying two rooms herself; and, secondly, by using the rest of the house to provide alternative accommodation for the defendant. I think in those circumstances that the plaintiff has satisfied the requirements of s. 4, sub-s. 1 (*d*), of the 1923 Act, by showing that she reasonably requires the premises as a residence for herself. The sub-section does not say that the whole dwelling-house is reasonably required by the landlord as a residence, but even if it did I think the plaintiff has established that she does require the whole of the dwelling-house as a residence.

I further think that the plaintiff has complied with the condition that alternative accommodation reasonably suitable to the means and needs of the tenant is available. I think that she is entitled to an order for possession of the whole of the premises on condition that five rooms in the house are available for the occupation of the defendant at the reasonable rent of 9*s.* 6*d.* a week. I think that the plaintiff has satisfied the requirements of the section, and that she is entitled to the order for possession of the whole house subject to the condition I have mentioned. It is only a variation in form, but not in substance, from the order made by the county court judge.

If it had been necessary I should have been prepared also to hold that the order of the county court judge in the form in which he has made it could have been justified, though not exactly on the grounds on which he has made the order. My only difficulty is that no such case has been before the county court judge. I think it might well have been held on the facts as they appear that the two rooms which were sublet furnished were a separate dwelling within the meaning of s. 12 of the Act of 1920, and being let furnished were outside the protection of the Act. In those circumstances, when the plaintiff brought her claim for possession she could only be met with the defence provided by the statute as regards the premises other than those two rooms. It is clear from *Prout* v. *Hunter* (1) that

(1) [1924] 2 K. B. 736.

in questions of this nature what has to be looked at is the status of the premises at the time the question arises. It is also clear from *Gidden* v. *Mills* (1) that in a claim for possession of the whole of the premises the Court may limit its order to that part of the premises to which the provisions of the Rent Restriction Acts do not apply. I think that the two rooms which were sublet in this way might well have been held to be a separate dwelling, as seems to have been contemplated in *Leslie & Co.* v. *Cumming.* (2) But this case was not dealt with in the county court on that footing, and the sub-tenant was not before the Court. The county court judge if he had so dealt with the matter would have had jurisdiction in my opinion to apportion the rent.

I agree that the appeal must be dismissed with the variation in the form of the order which I have indicated.

Appeal dismissed.

Solicitors for plaintiff: *Aplin Nichols, Son & Coutts.*
Solicitors for defendant: *Watkins, Pulleyn & Ellison.*

(1) [1925] 2 K. B. 713. (2) Ante, p. 417.

R. F. S.

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May 10.

ARMSTRONG (APPELLANT) *v.* OGLE (RESPONDENT).

Local Government—Hackney Carriage—Omnibus—"Plying for hire" without a Licence—Issue of Return Tickets—Picking up Holders of Return Tickets within prescribed Area—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 45—*Town Police Clauses Act*, 1889 (52 & 53 *Vict. c.* 14), *s.* 3.

The appellant was the driver of an omnibus, which was not licensed to ply for hire within the borough of Gateshead. While the omnibus was standing within that borough three passengers entered it with return tickets issued to them at Chester-le-Street entitling them to travel from Chester-le-Street to Newcastle-upon-Tyne and back either on the day of issue or at any future time. The tickets entitled the holders to leave or to join the omnibus at any point on its journey. The owner of the omnibus was a member of an association of omnibus proprietors whose vehicles ran regularly and frequently between Chester-le-Street and Newcastle-upon-Tyne. The return tickets were available for return by any omnibus belonging to a member of the association, and not merely by one belonging to that member by whom the ticket was originally issued. Separate fares were charged for each passenger, and the association made their own arrangements and adjustments to ensure that each member received the earnings of his own vehicles :—

Held, that inasmuch as the omnibus was being used in Gateshead for the collection and reception of passengers out of the large unknown and indeterminate class of persons who possessed return tickets it was plying for hire within the prescribed limits of the borough of Gateshead, and that therefore the appellant was properly convicted of an offence under s. 45 of the Town Police Clauses Act, 1847.

Principle stated by Montague Smith J. in *Allen* v. *Tunbridge* (1871) L. R. 6 C. P. 481, 485 applied.

Sales v. *Lake* [1922] 1 K. B. 553 distinguished.

CASE stated by justices for the borough of Gateshead.

An information was laid by the respondent, Richard Ogle, under the Town Police Clauses Acts, 1847 and 1889, against the appellant, Ernest Mason Armstrong, for having been found in the borough of Gateshead on January 16, 1926, unlawfully plying for hire with a certain omnibus within the prescribed distance in that behalf of the said borough, for which omnibus a licence to ply for hire there had not been previously obtained.

Upon the hearing of the information on February 3, 1926, the following facts were admitted or proved :—

At about 11-45 P.M. on January 16, 1926, a motor omnibus driven by the appellant was seen standing in Gladstone

Terrace, Gateshead, within the prescribed distance in that behalf of the county borough of Gateshead.

No licence to ply for hire within the said prescribed distance had then been obtained in respect of the said omnibus, as required by the statutes in that behalf.

Whilst the omnibus was so standing three passengers were seen to enter, and the omnibus then moved on to the Durham Road, with the apparent intention of proceeding southwards in the direction of Low Fell and Chester-le-Street.

A constable of the Gateshead county borough police then stopped the omnibus and interrogated the appellant and the passengers. He ascertained, and the justices so found as facts, that the passengers were travelling with return tickets issued to them at Chester-le-Street (a place not within the prescribed limits), entitling them to travel from Chester-le-Street to Newcastle-upon-Tyne, and to return from Newcastle-upon-Tyne to Chester-le-Street either on the day of issue of the said tickets or at any future time. Gateshead is situated between Newcastle-upon-Tyne and Chester-le-Street, and the tickets entitled the holders to leave or to join the omnibus at any point on its journey.

The owner of the omnibus was a member of an association of omnibus proprietors whose vehicles ran regularly and frequently between Chester-le-street and Newcastle-upon-Tyne, as well as in other directions. The return tickets mentioned were available for return by any omnibus belonging to a member of the association, and not merely by one belonging to that member by whom the ticket was originally issued. Separate fares were charged for each passenger, and the association made their own arrangements and adjustments to ensure that each member received the earnings of his own vehicles.

On the part of the appellant it was contended that, inasmuch as no fares were collected at Gateshead and no passengers were proved to have travelled upon the said omnibus except such as possessed return tickets as aforesaid, issued outside of the prescribed limits where the appellant was licensed to

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ply for hire, there had been no plying for hire within the said limits, and therefore the appellant was not guilty of the offence wherewith he was charged. *Sales* v. *Lake* (1) was cited in favour of the appellant, and it was further contended that the case was within the exception mentioned in s. 3 of the Town Police Clauses Act, 1889. (2)

On the part of the respondent it was contended that the omnibus was being used for the collection or reception of passengers within the prescribed limits, and that the place where the fare was paid was an immaterial consideration. *Rex* v. *Fletcher. Ex parte Ansonia* (3) was cited as an authority in favour of the respondent's contention. For the same reason it was contended that the case was not within the exception of s. 3 of the Town Police Clauses Act, 1889. (2)

The justices were of opinion that *Sales* v. *Lake* (1) turned and was decided upon the special facts there found, which were different from those in the present case. They considered this case more to resemble *Rex* v. *Fletcher. Ex parte Ansonia* (3), which they decided to follow, and accordingly convicted the appellant and imposed a fine of 10*s*.

(1) [1922] 1 K. B. 553.

(2) Town Police Clauses Act, 1847, s. 37: "The Commissioners may from time to time license to ply for hire within the prescribed distance . . . . such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit."

Sect. 45: ". . . . If any person be found driving, standing, or plying for hire with any carriage within the prescribed distance, for which such licence as aforesaid has not been previously obtained, ... every such person so offending shall for every such offence be liable to a penalty. . . . ."

The Town Police Clauses Act, 1889, is by s. 2 to be construed as one with the Town Police Clauses Act, 1847.

Sect. 3: "The term 'omnibus' where used in this Act shall include

Every omnibus, char-à-banc, wagonette, brake, stagecoach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance;

but shall not include . . . .

any omnibus starting from outside the prescribed distance, and bringing passengers within the prescribed distance, and not standing or plying for hire within the prescribed distance."

By s. 4 the terms "hackney carriages" and "carriage" whenever used in ss. 37, 40–52, 54, 58 and 60–67 of the principal Act shall "be deemed to include every omnibus."

(3) (1908) 98 L. T. 749.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law.

Konstam K.C. and *Paley Scott* for the appellant. The appellant was convicted under s. 45 of the Town Police Clauses Act, 1847, of unlawfully plying for hire with an omnibus within the prescribed distance without a licence having been previously obtained for the omnibus. The expression "within the prescribed distance" is defined in s. 171 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which incorporates the provisions of the Town Police Clauses Act, 1847, with respect to hackney carriages, as meaning "within any urban district." "Plying for hire" means soliciting with importunity or persistence. The definition of "omnibus" in s. 3 of the Town Police Clauses Act, 1889, would have been wide enough, but for the last exception, to include an omnibus carrying passengers through the prescribed distance and not plying for hire within the prescribed distance. The last exception to that section covers the present case, as the omnibus started from outside the prescribed distance and was not plying for hire within the prescribed distance; it was only picking up passengers who already held return tickets which had been purchased outside the prescribed distance. The question for decision is whether the appellant had a right to issue return tickets outside the prescribed distance, and whether picking up passengers who had return tickets within the prescribed distance was plying for hire within the prescribed distance.

[LORD HEWART C.J. The return tickets are available for the return journey by any omnibus belonging to a member of the associated proprietors, at any time after the ticket is issued, at any point of the journey and by any person. There is no provision that the ticket shall not be transferable. Except for the fact of the return ticket this would clearly be plying for hire within the prescribed distance.]

It is found in the case that the passengers that were in fact being carried on the return journey were the persons

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to whom the return tickets had been issued. The place where the fares were solicited and collected was some distance outside the urban district of Gateshead; it cannot be suggested that that place is immaterial. The fact that the persons who were picked up as passengers on the return journey had already made a contract for their carriage on the return journey prevents the person picking them up from plying for hire. The bus did not pick up any one who was not the holder of a return ticket. The words "or used to carry passengers" in s. 3 of the Act of 1889 merely define an omnibus. There is no penalty for using an omnibus to carry passengers, but only for plying for hire without a licence.

[LORD HEWART C.J. What is there to prevent the tickets being sold at Gateshead for the journey to Chester-le-Street and the return ticket being used for the journey to Gateshead ?]

It is found in the case that the tickets are only issued at Chester-le-Street. This case is covered by the decision of this Court in *Sales* v. *Lake*. (1) That case shows that there must be a soliciting or waiting to secure passengers by the driver without any previous contract with them, and also an appropriation of a carriage to the soliciting or waiting in order that there may be a plying for hire.

[LORD HEWART C.J. In *Sales* v. *Lake* (1) there was a vehicle appropriated to a certain small number of ascertained individuals. That case is very different from one where passengers may travel to their destination by one omnibus and return by another omnibus perhaps on a different day, and where the vehicle is open to collect a wide class of passengers.

SHEARMAN J. In *Sales* v. *Lake* (1) the conductor was told to pick up booked passengers at certain defined places, but in this case the conductor is looking everywhere for any one who may hail him.]

The Acts were intended to regulate or to prevent any one from touting for hire with an unlicensed hackney carriage. If any one wishes to ply for hire with a carriage within the prescribed distance the carriage must be licensed, but a person may carry passengers through the area without

(1) [1922] 1 K. B. 553, 557.

plying for hire. It was held in *Sales* v. *Lake* (1) that if passengers are carried in performance of a contract previously made for the carriage of passengers that is not a plying for hire. In that case the vehicle was not designated when the contract for carriage was made. The contract in the present case is similar to the contract in *Sales* v. *Lake* (1), with the exception that it may be implemented on a different day. The question involved in plying for hire is not one of collecting passengers, but of soliciting persons to make a contract of carriage. In all the cases it has been held that "plying for hire" means soliciting or importuning urgently. In *Sales* v. *Lake* (1) the char-à-banc was collecting passengers, but was not soliciting passengers. The facts in *Rex* v. *Fletcher. Ex parte Ansonia* (2) were very different from the facts of the present case. That was a clear case of plying for hire. The sections of the Acts of 1847 and 1889 ought to be construed strictly and ought not to be held to apply to a case to which the sections were obviously not intended to apply: *Birmingham and Midland Motor Omnibus Co.* v. *Thompson.* (3) In the present case the hire had already been paid in performance of a contract previously made, whereas in a case where a carriage is plying for hire there is no contract in existence and the hire has not previously been paid.

[*Clarke* v. *Stanford* (4); *Bateson* v. *Oddy* (5); and *Allen* v. *Tunbridge* (6) were also referred to.]

Cave K.C. and *C. J. Conway* for the respondent. The phrase "plying for hire" is not used in these statutes in the sense of soliciting or importuning. In these statutes the word "ply" is used as an intransitive verb, and the true meaning is given in the Oxford Dictionary as "To wait or attend regularly, to have one's stand at a certain place for hire or custom." The more usual meaning of the word is to go to and fro. The statute however does not say "plying for hire in a street," but "plying for hire with a carriage." In *Sales* v. *Lake* (1) the circumstances were such that there

(1) [1922] 1 K. B. 553.
(2) 98 L. T. 749.
(3) [1918] 2 K. B. 105.
(4) (1871) L. R. 6 Q. B. 357.
(5) (1874) 30 L. T. 712.
(6) L. R. 6 C. P. 481.

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could not be a plying for hire, but it was not accurate in that case to say that plying for hire involved soliciting to secure passengers, other than an implied soliciting from the mere fact of going to and fro.

[AVORY J. The expression in s. 45 of the Act of 1847 is "driving, standing or plying for hire." If we adopt your interpretation of "plying for hire" is not that expression in that section redundant ?]

The expression is a well known one, and includes standing for hire and driving for hire. There was no previous contract for a return journey by this particular bus. In *Sales* v. *Lake* (1) a particular vehicle was appropriated to the particular passengers for a particular journey.

[They were stopped.]

Konstam K.C. replied.

LORD HEWART C.J. [after stating the facts contained in the special case continued:] Then follows this important statement as part of the findings of fact in this case: "The owner of the said omnibus is a member of an association of omnibus proprietors, whose vehicles run regularly and frequently between Chester-le-Street and Newcastle-upon-Tyne as well as in other directions. The return tickets are available for return by any omnibus belonging to a member of the association and not merely by one belonging to that member by whom the ticket was originally issued. Separate fares are charged for each passenger, and the association make their own arrangements and adjustments to ensure that each member receives the earnings of his own vehicles." How much exactly is comprised in that last sentence it would be unprofitable to conjecture, but at least it seems to say as clearly as words can that notwithstanding any denomination by number or otherwise upon the ticket, adjustments are made so as to ensure that each owner of these omnibuses shall receive—what ? The payment for the ticket which he happens to have issued, if he has issued any ? Not at all: "the earnings of his own vehicles," which must clearly mean

(1) [1922] 1 K. B. 553.

the earnings upon the return journey as well as upon the outward journey. A ticket has been produced; it is probably the most remarkable return ticket ever issued. I will read everything that is upon it. "Chester-le-Street. 1*s.* 2*d.* R. Newcastle. General. No. 3." There is no limitation about transfer, and no date of any kind whatever upon the ticket, whether date of issue or date of return. It is quite clear that that ticket was available for a journey by any of these vehicles at any time by any person in whose possession it might happen to be.

In that state of facts it was contended on the part of the appellant—and, it is interesting to observe, the sole ground upon which the matter was put—that, inasmuch as no fares were collected at Gateshead, and no passengers were proved to have travelled upon the omnibus except such as possessed return tickets issued outside of the prescribed limits, there had been no plying for hire within the prescribed limits. The respondent, on the other hand, contended that the omnibus was being used for the collection or reception of passengers within the prescribed limits. The justices came to the conclusion that the argument for the respondent was right. They purported to follow the case of *Rex* v. *Fletcher*. *Ex parte Ansonia*. (1) That case seems to have little bearing upon the present case, except that it was manifestly a case of plying for hire, and in it Lord Alverstone C.J. observed that what was being attempted was a device for evading the provisions of the statutes requiring a licence to be obtained to ply for hire within the urban district. In this case also I think the plan adopted by the appellant was a good plan for evading the statutes, but it was not good enough.

Great stress has been laid upon the decision in *Sales* v. *Lake* (2), but that case, in my opinion, is not so much this case as the opposite of it. What is the principle to be applied? It was stated in a single sentence by Montague Smith J. in *Allen* v. *Tunbridge* (3), where he said (referring to a previous case): "It appears to have been held there, that, if the

(1) 98 L. T. 749.
(2) [1922] 1 K. B. 553.
(3) L. R. 6 C. P. 481, 485.

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proprietor of a carriage sends it to a place for the purpose of picking up passengers, that is a plying for hire within the Act. That is very different from a customer going to a job-master to hire a carriage." The contrast is between a particular and definite private hiring and a public picking up of passengers. That principle was applied in *Sales* v. *Lake* (1) to the particular facts which that case disclosed, and it is to be observed that Lord Trevethin C.J. said this (2): "If there had been any empty seats for which the driver was prepared to take in casual passengers, I think he would have been plying for hire." That was a case of a particular vehicle about to enter upon a particular journey, with a defined number of seats to be occupied by particular ascertained persons. That case is very different from the present case; indeed, there is a complete lack of resemblance between the two cases. Here the alleged contract was made about no particular omnibus; it was made about no particular person; it had to do with no particular journey; it was not limited to any particular day, week, month, year, or even quinquennial period. When this particular omnibus set out upon its journey all the driver of it knew about the persons he was to collect and pick up in order to bring them back was that they were to belong to a large, unknown, indeterminate class of persons who happened to possess these return tickets, and to whom, if they attracted his attention, he was to offer a place in his omnibus. If that is not picking up passengers, I do not know what is. It is quite true that in a particular passage in *Sales* v. *Lake* (3) it is said that "plying for hire" means "soliciting custom without any previous contract," but that passage must of course be read secundum subjectam materiam. It could not for a moment be seriously suggested that it meant that there could be no plying for hire if it was possible to point to some sort of a contract between any person and some other person. What was being referred to there was a particular and precise contract to carry a particular person or particular persons for a particular journey by

(1) [1922] 1 K. B. 553. (2) [1922] 1 K. B. 558.

(3) [1922] 1 K. B. 562.

means of a particular vehicle. Now this case, so far from dealing with particular or private or personal contracts, has the word "general" written all over it, as indeed has the little ticket itself. Here there was not a private hiring; there was a public and general service, and the contrast pointed out by Montague Smith J. in *Allen* v. *Tunbridge* (1) clearly applies.

What in strictness is the question raised by this special case? The justices upon the materials before them have found that here there was, within the meaning of the section, a plying for hire with a carriage. The question for this Court, I think, is whether there were facts from which the justices, rightly interpreting the law, could draw the conclusion that there was on this occasion a plying for hire. I am satisfied that they could draw that conclusion, and, indeed, that they were bound to draw it, though that does not matter.

In these circumstances, and for these reasons, I think that this appeal fails.

AVORY J. I am of the same opinion. Having been a party to the judgment in *Sales* v. *Lake* (2) I have listened sympathetically to the argument of Mr. Cave in support of the conviction in this case, because it was only after considerable hesitation that McCardie J. and I in *Sales* v. *Lake* (2) came to the conclusion that we could not say that the magistrate was wrong in that case in holding that there was no plying for hire by a stage carriage within the meaning of s. 7 of the Act of 1869, which was then under consideration. I agree entirely with my Lord that the distinction between the present case and *Sales* v. *Lake* (2) is to be found in this. Lord Trevethin C.J. in that case said (3): "In my judgment a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1.) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them." I need not read the second condition, because that applied

(1) L. R. 6 C. P. 481, 485. (2) [1922] 1 K. B. 553.
(3) [1922] 1 K. B. 557.

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only to the question whether there was any vehicle at that time the subject of any contract. Now I am satisfied that in using those words Lord Trevethin meant that to satisfy that condition there must be a previous contract, that is a particular contract with particular passengers to drive them in some particular vehicle. When I said in my judgment (1), that " ' plying for hire ' means soliciting custom without any previous contract," I certainly never intended to include a contract of such a nature as that which is relied upon in this case, because I think that the inference which ought to be drawn from the special case is that the omnibuses which pick up passengers on the return journey have a pecuniary interest in picking them up and carrying them. That can only be, I think, the meaning of the words that " each member receives the earnings of his own vehicles." Although there is no contract that the passenger shall be carried by that particular vehicle, the vehicle in fact has a pecuniary interest in picking up the passengers. That seems to me to make the distinction between the present case and *Sales* v. *Lake* (2), and for these reasons I agree that this conviction should be supported.

SHEARMAN J. I agree, and I have only two observations to add. One is provoked by the statement of my brother Avory that he had some doubt whether *Sales* v. *Lake* (2) was properly decided, although eventually he came to the conclusion that he expressed in his judgment. In my opinion the decision in that case was perfectly right, and I think that my brother Avory was quite right in the decision he came to in that case. But *Sales* v. *Lake* (2) is not this case. As I understand " plying for hire " a distinction was drawn in that case, as in many previous cases, between offering a seat in a carriage to a member of the public and particular individuals hiring a carriage for a particular journey. This case is neither the one nor the other ; one has not the same alternative, and the word " contract " alluded to in that case refers to a contract by one or more definite individuals

(1) [1922] 1 K. B. 562. (2) [1922] 1 K. B. 553.

to take a definite journey in a carriage to be provided for them for that purpose on a definite day. With regard to the contractual right which is alleged by Mr. Konstam to exist in the present case, to put it at its best, it is something like the second half of a return ticket given by a railway company, which gives a right to travel back by a number of trains. It is quite obvious from the findings in the case that there was a very large number of persons who were entitled to travel by these omnibuses, because it is found that the omnibuses ran on this journey frequently and at regular intervals, which means that there must have been a great number of persons entitled to travel by them. It is not necessary in finding a plying for hire that the justices should be satisfied that every member of the public is invited to travel for hire; it is sufficient if there is a large section of the public who are invited to travel for hire. I do not think it could be argued, if for instance an omnibus ran to a particular camp and only carried soldiers in it for hire and picked up everybody that was in uniform, that the omnibus was private, on the ground that it was confined to a particular, though a large, class of persons. I think in this particular case it is quite clear that the justices were right in finding that when the appellant ran an omnibus through the streets of Gateshead, stopping at definite places and going along a definite route and picking up persons who the driver and the conductor had probably never seen before, because they were members of a large class of persons who were in possession of a return ticket, there was a plying for hire. For these reasons I think this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *King, Wigg & Co., for F. J. Lambert, Gateshead.*

Solicitors for respondent: *Maples, Teesdale & Co., for Lambert & Lambert, Gateshead.*

R. F. S.

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[*June* 10, 17.

KREDITBANK CASSEL G.M.B.H. *v.* SCHENKERS, LIMITED, AND OTHERS.

[1925. K. 219.]

Company—Liability on Bills of Exchange—Bills drawn on Behalf of Company by Official — Assistant or Branch Manager — Implied Authority in Virtue of Articles of Association—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 77.

The articles of association of a company empowered the directors to determine who should be entitled to sign and make, draw, accept and indorse on the company's behalf bills, notes, receipts, acceptances, endorsements, cheques, etc. The company, whose business was that of forwarding agents, had a branch at Manchester under a branch manager, S. C. This branch manager, without having in fact received any authority from the company, and acting in fraud of the company, drew seven bills of exchange on behalf of the company signed "S. C., Manchester manager." The bills were drawn to the order of the company, they were accepted by C. & W. and indorsed on behalf of the company "S. C., Manchester manager." In an action on the bills by the holders in due course against the company as drawers :—

Held, that S. C., in drawing the bills on behalf of the company as branch manager, was a person acting under its authority within the meaning of s. 77 of the Companies (Consolidation) Act, 1908, and that the company was liable, inasmuch as by the constitution of the company the branch manager might have been authorized to draw the bills, and so a person taking them in due course was not prejudiced because he had not authority in fact.

ACTION tried before Wright J. as a short cause.

The following statement of facts is taken from the judgment :—

"The plaintiffs, a German bank, claim as holders of seven bills of exchange, of which the defendants were drawers and indorsers, and which the acceptors have dishonoured. The present trial concerns the defendants, the drawers and indorsers only; they obtained leave to defend under Order XIV.

"The defendants are a limited company incorporated on February 16, 1921, having a registered office at 15 Eldon Street, in the City of London; their business is that of general carriers, forwarding and shipping agents and warehousemen. They have a branch office at Manchester, of which one Sydney Clarke was branch manager.

"The defendant company, by its memorandum, had power to sign, make, draw, accept, and indorse bills of exchange. By art. 18 of the articles of association it was provided as follows: 'The directors shall have power to determine who shall be entitled to sign and make, draw, accept and indorse on the company's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts and documents.'

"Two resolutions of the directors were passed on May 14, 1923. By one resolution the defendant company's bank was empowered to honour cheques, bills of exchange and promissory notes drawn, signed, accepted or made on behalf of the company by Mr. J. de Vorsen (manager) and Mr. W. Jager (assistant manager) or by any one director. A later resolution passed on January 2, 1924, was to a similar effect. By the other resolution, the bank was empowered to honour on behalf of the company the signature of Mr. S. Clarke on all cheques payable only to His Majesty's Customs. Such cheques were in fact in payment of reparation duties. S. Clarke was described as assistant manager, but in fact he had, with the directors' assent, and used a rubber stamp with which he could sign on behalf of the defendant company as Manchester manager.

"In general all finance was controlled by the London office, and though Clarke indorsed cheques and paid them into the defendant company's bank, he was required to send cheques drawn by the defendant company, other than those dealt with in the resolution, to the London office for signature. The defendant company was closely connected with a large and important transport company called Schenker & Co., Berlin, whose head office was in Berlin and which had various branches in Germany, including one at Sonneberg.

"In August, 1924, Sydney Clarke became concerned in the formation of a company called Clarke & Walker, Ld., and in September of that year went to Sonneberg, and on that company's behalf made a large purchase of toys from a merchant called Teichmann, of Sonneberg. He arranged that payment should be made to Teichmann by bills drawn

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in the name of the defendant company payable to their order and drawn upon Clarke & Walker, Ld. The defendant company had no knowledge of this and gave Clarke no authority; his action was a fraud on the defendant company. He was, however, supported in these proceedings by the manager at Sonneberg of Schenker & Co., Berlin, a man called Bauer.

"Under this arrangement seven bills were drawn, each for 200*l.*, and each dated Manchester, September 23, 1924, drawn on behalf of Schenkers, Ld., S. Clarke, Manchester manager, to drawer's order, accepted by Clarke & Walker, Ld., and indorsed on behalf of Schenkers, Ld., S. Clarke, Manchester manager. Teichmann took them to the plaintiff bank who, having obtained unsatisfactory reports as to Clarke & Walker, Ld., refused at first to discount more than three bills (600*l.* in all) without further security. It was then arranged between the plaintiff bank and Teichmann that they would discount the remaining four bills if they had the further security of the indorsement of Schenker & Co., Sonneberg, which was done, Bauer signing in their name. The plaintiff bank thereupon discounted the bills, and in turn had them discounted with the Dresdner Bank at Frankfort.

"It was admitted that the plaintiff bank acted in good faith and without any actual or constructive notice of any irregularity on the part of Clarke, or any actual suspicion or ground of suspicion that his conduct was unauthorized. The defendant company, however, when the bills were presented and dishonoured by the acceptors and notice was given them, repudiated the whole transaction and stated that Clarke had acted without their authority, so that they were in no way liable for the bills.

"The plaintiff bank sue as holders in due course, having repaid the Dresdner Bank and obtained the bills."

D. B. Somervell for the plaintiff. The signature of S. Clarke to the bills of exchange "on behalf of Schenkers, Ld.," was not a signature by procuration within s. 25 of the Bills of Exchange Act, 1882, but purports to be a signature of th-

company: *Alexander Stewart & Son of Dundee, Ld.* v. *Westminster Bank, Ld.* (1)

[*D. N. Pritt.* I admit that, having regard to the decision of Rowlatt J. in that case, that point is not open to me in this Court; but I reserve my right to contend otherwise in another Court.]

The plaintiffs are entitled as the holders of the bills to recover from the defendant company, Schenkers, Ld., inasmuch as these bills were signed by S. Clarke on behalf of the defendant company. Art. 18 of the defendant company's articles of association gives a general power to the directors of the company to determine who shall draw and indorse bills on the company's behalf. The words used in the article are wide enough to cover any servant of the company such as a manager or assistant or branch manager. In fact the directors passed a resolution authorizing the manager and assistant manager of the company to draw and indorse bills on behalf of the company. The rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings; they are entitled to assume that all is being done regularly. If a party dealing with a company finds that the authority to do a certain act might be made complete by a resolution he would have the right to infer the fact of a resolution authorizing that which on the face of the document appears to be legitimately done: Palmer's Company Law, 12th ed., p. 44; *Royal British Bank* v. *Turquand* (2); *Mahony* v. *East Holyford Mining Co.* (3) In the present case Clarke had apparent authority to sign the bills. The fact that he was in charge of the Manchester office and signed the correspondence brought him within the class of persons who might

(1) [1926] W. N. 126.
(2) (1855) 5 E. & B. 248; (1856) 6 E. & B. 327.
(3) (1875) L. R. 7 H. L. 869.

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be authorized under art. 18 to sign and indorse bills on behalf of the company. In *Dey* v. *Pullinger Engineering Co.* (1) the managing director of a company drew a bill on behalf of the company without having in fact received any authority from the directors to draw bills. The articles of association of the company empowered the directors to authorize the managing director to draw bills on behalf of the company. It was held that the company were liable, as a person taking the bill in due course was entitled to assume that the managing director had in fact the authority which he might have had under the articles. It was held in *Biggerstaff* v. *Rowatt's Wharf, Ld.* (2), that persons dealing bona fide with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the company a managing director can have. Lopes L.J. said (3) that: "In Lindley on Companies, 5th ed., p. 159, the law is thus laid down: 'Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless—(1.) their employment was altogether beyond the powers of the directors; or unless, (2.) the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent bona fide and without notice of the irregularity in his appointment.'" In *Mahony's* case (4) the liquidator of a company was held bound by a document signed by a person who purported to be the secretary of the company. In considering this question it is necessary to consider the position of third parties. If the articles of association give the directors power to authorize any person to sign bills on behalf of the company, a third person is entitled to assume that a person who purports to sign bills on behalf of the company is authorized so to do, and

(1) [1921] 1 K. B. 77.
(2) [1896] 2 Ch. 93.
(3) [1896] 2 Ch. 103.
(4) L. R. 7 H. L. 869.

the company will be bound. An assistant branch manager would have implied authority to sign a bill apart from art. 18 so as to bind the company to third persons. That would follow from the fact that he had been held out by the company as manager, and as such he must have implied authority to manage.

D. N. Pritt for the defendant company, Schenkers, Ld. The principle with regard to persons dealing with a company is that it is necessary to show that the person is dealing with the directors of the company, or that he is dealing with a person who has been placed by the company in such a position that it must be presumed that he had authority to do the act which he purported to do. Under art. 18 the directors of Schenkers, Ltd., might authorize any person to draw bills on behalf of the company, and if the proposition contended for by the plaintiffs is correct any one, even a messenger or office boy, might draw a bill on Schenkers, Ld., and negotiate it and make Schenkers, Ld., liable. Before the defendants can be held to be liable the plaintiffs must prove that a person occupying the position that Clarke occupied would, according to ordinary mercantile usage, have authority to sign bills on behalf of the company; there must be an actual holding out of such person by the company. This case does not fall within the principle laid down in *Royal British Bank* v. *Turquand*. (1) That principle only applies to the persons actually managing the company—namely, the directors. The principle would not apply to the acts of a branch manager unless he had actual authority, or was put in such a position that he had implied authority to sign bills on behalf of the company. A branch manager of a forwarding business would not have authority to draw bills on a toy dealer. The principle laid down in *Royal British Bank* v. *Turquand* (1) has been applied in a number of cases to directors and to directors only, and never to a case of a branch manager or assistant manager. In *In re Country Life Assurance Co.* (2) Giffard L.J. said: "The company is bound by what takes

(1) 5 E. & B. 248; 6 E. & B. 327.

(2) (1870) L. R. 5 Ch. 288, 293.

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place in the usual course of business with a third party where that third party deals bona fide with persons who may be deemed de facto directors, and who might, so far as he could tell, have been directors de jure."

In *In re Land Credit Bank of Ireland* (1) Selwyn L.J. said, quoting from *Fountaine* v. *Carmarthen Ry. Co.* (2), that if " the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed He is entitled to presume that the directors are acting lawfully in what they do." He added that that was the result of *Royal British Bank* v. *Turquand.* (3) The passage from Lindley on Companies cited by Lopes L.J. in *Biggerstaff* v. *Rowatt's Wharf* (4) was cited at a time when Lindley L.J. was sitting in the Court of Appeal, and in that very case he had expressed himself with regard to this matter in a way which was entirely adequate and in which he referred only to directors. *Mahony* v. *East Holyford Mining Co.* (5) was cited to show that the doctrine applied to the secretary of a company, but the judgments of the House of Lords deal only with the position of directors, and the application of the rule in *Turquand's* case (3) to the acts of directors. Unless a person comes within the rule in *Turquand's* case (3) he comes within the ordinary rule that in order to bind a company it must be shown that he is in such a position that he has authority to sign bills on behalf of the company.

[*Whitechurch* v. *Cavanagh* (6) was also cited.]

D. B. Somervell in reply. The rule in *Turquand's* case (3) has never in terms been restricted to directors. A manager of a company is in a better position than a director under the rule in *Turquand's* case (3), because a director as such has no authority to bind the company.

Cur. adv. vult.

(1) (1869) L. R. 4 Ch. 460, 469.
(2) (1868) L. R. 5 Eq. 316, 322.
(3) 5 E. & B. 248; 6 E. & B. 327.
(4) [1896] 2 Ch. 103.
(5) L. R. 7 H. L. 869.
(6) [1902] A. C. 117.

1926. June 17. WRIGHT J. read a judgment in which he stated the facts set out above and continued as follows :—

It was not contended that S. Clarke had actual authority to pledge the defendant company's credit by drawing or indorsing the bills, but the plaintiffs contended that he had implied or apparent authority, which the defendant company denied.

By s. 77 of the Companies (Consolidation) Act, 1908, it is provided as follows: "A bill of exchange . . . . shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

In *Dey* v. *Pullinger Engineering Co.* (1) it was held by a Divisional Court, dissenting from an earlier decision of Pickford J. in the *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (2), that the word "authority" in that section was to be understood in its natural and ordinary meaning as including not only express but also implied or apparent authority. The Divisional Court in particular based their decision on a judgment of the Court of Appeal in *In re Land Credit Co. of Ireland* (3) (under the Companies Act, 1862), and on a passage from the judgment of Selwyn L.J. in the following words (4): "The question still remains, who is properly to be considered a person acting under the authority of the company, and that matter, I think, has been settled by the several decisions to which reference has been made, the effect of which is very concisely and clearly summed up by the present Lord Chancellor in *Fountaine* v. *Carmarthen Ry. Co.* (5) His Lordship says: 'In the case of a registered joint stock company all the world, of course, have notice of the general Act of Parliament, and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the

(1) [1921] 1 K. B. 77.
(2) [1909] 1 K. B. 106.
(3) L. R. 4 Ch. 460.
(4) L. R. 4 Ch. 468.
(5) (1868) L. R. 5 Eq. 316, 322.

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directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (1), the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank* v. *Turquand*. (2) That case of *Royal British Bank* v. *Turquand* (1) may now, I think, be considered as a leading authority applicable to cases of this description, and, so far as I am aware, it has never been questioned."

The Divisional Court, in *Dey's* case (3), held a company liable on a bill of exchange drawn by a managing director on behalf of the company. He had no actual authority to do so, but under the articles of association the directors were given power to give the managing director authority. The Divisional Court held that the holder was entitled to assume that the managing director was duly invested with the authority which under the articles he might have had.

Mr. Pritt, for the defendant company, in the present case did not contest the principle of the authority last cited and the long series of authorities in which the principle of the *Royal British Bank* v. *Turquand* (1) has been applied, but he contended that the principle only applied to directors. If Clarke had been a managing director, I understand Mr. Pritt would not have felt able to deny liability; but the case was otherwise, he contended, where, as here, the officer who signed was not a director, but only a branch or assistant manager. He referred, in addition, to *Royal British Bank* v. *Turquand* (1), to a number of other cases in which the principle has been applied: *Mahony* v. *East Holyford Mining Co.* (4); *Biggerstaff* v. *Rowatt's Wharf, Ld.* (5), and others, and pointed

(1) 5 E. & B. 248; 6 E. & B. 327.
(2) 5 E. & B. 248.
(3) [1921] 1 K. B. 77.
(4) L. R. 7 H. L. 869.
(5) [1896] 2 Ch. 93.

out that the authorities so far dealt only with the case of directors, and did so in terms. That may be so, but what was in question in these cases was the effect to be given to the acts of officers who were or appeared to be directors or managing directors, where the articles of association empowered delegation only to directors. In the present case, art. 18, quoted above, is much wider in terms; it empowers the directors to determine who shall be entitled to sign bills of exchange on the company's behalf. In my judgment that article was designedly so worded as to enlarge the power of delegation beyond the category of directors, and indeed the power was in fact so used by the directors in the resolutions quoted above, the first of which authorized the manager and assistant manager (both at the London office) to sign negotiable instruments generally on behalf of the company, and the second of which authorized Clarke, as assistant or Manchester manager, to sign on behalf of the company a limited class of cheques. If the directors had, under art. 18, passed a resolution giving Clarke a general power as wide as that given to the persons nominated in the first resolution, I am satisfied that it would have been a valid authority in general terms under art. 18.

The rule in *Turquand's* case (1) is of peculiar importance in the case of negotiable instruments. A limited company is not competent to draw, accept or indorse bills of exchange unless by the memorandum it is given special power to do so. If it is so given it must depend on the articles who may sign such instruments on behalf of the company. The memorandum and articles are public documents, and every one dealing in such matters with a limited company is taken in law to be acquainted with their terms. But once it appears that the company has the necessary power, and that the person purporting to bind the company by his signature to the negotiable instrument on the company's behalf falls within the category of persons who under the articles might be properly so empowered if the appropriate steps by way of internal management have been taken, the company will

(1) 5 E. & B. 248; 6 E. & B. 327.

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be bound. On any other basis the position of persons dealing with the negotiable paper of a limited company would be very difficult and business could not go on. The rule is subject to the obvious limitation that the person so dealing must have no actual or constructive notice that the professing agent of the company has not authority in fact: *Underwood, Ld.* v. *Bank of Liverpool & Martins.* (1) I do not find it laid down as a condition that the person so dealing must have actually examined the articles of association. In business he would seldom or never do so, but take the risk. He is bound by the articles if they are adverse to his claim: it seems that if the articles are in his favour he should be entitled to benefit by their terms.

Mr. Pritt contended that in the present case the view just expressed would carry with it the consequence that the bills of exchange in question might have been signed as on behalf of the company by the messenger or office boy. If that were the true effect of art. 18, no doubt that result would follow. But I do not think it is the true effect. The mere description of messenger or office boy would take the case out of the category of persons who would ordinarily be entrusted with the power under the article, and would further carry with it notice of irregularity according to business usage. It is enough here to say, for the reasons I have given, that the Manchester manager is a person who falls within a fair construction of art. 18.

Mr. Pritt disclaimed in this Court any reliance on s. 25 of the Bills of Exchange Act, 1882, and did not contend that the signatures in the present case were signatures by procuration. As a limited company can only sign by agents, any other view would carry with it the result that a bill of exchange could only be enforced against a company on proof of actual authority. I may refer, on this point, to the language of Scrutton L.J. in his judgment in the Court of Appeal, in *McDonald & Co.* v. *Nash & Co.* (2), a partnership case. His Lordship said: "I refer to the careful judgment of

(1) [1924] 1 K. B. 775. (2) Unreported. See [1922] W. N. 272.

Pigot C.B. in *O'Reilly* v. *Richardson* (1), with which I agree. He limits the case in which one is put on inquiry to cases where the form of signature shows a special and limited authority, as 'per procuration' or under power of attorney, and excludes cases of a general authority, as 'A. for B.'" When the case came before the House of Lords (2) the point was not taken.

For the above reasons there will be judgment for the plaintiffs for the amount claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Durrant Cooper & Hambling.*
Solicitors for defendants: *Wm. A. Crump & Son.*

R. F. S.

THE KING *v.* BRATTON AND MOXON, JUSTICES OF STOKE-ON-TRENT, AND ANOTHER.

1926
May 19, 20.

Justices—Special Case—Application for—Copies for Justices—Time for leaving—Refusal of Case—Mandamus—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 33—*Summary Jurisdiction Rules,* 1915–1922, *St. R. & O.* 1915, *No.* $\frac{200}{\text{L. 12}}$, *r.* 52.

Under r. 52 of the Summary Jurisdiction Rules, 1915–1922, it is necessary not only that the application in writing to a court of summary jurisdiction to state a special case should be left with the clerk of the court within seven clear days from the date of the proceedings to be questioned, but also that the copy of the application to be left with the clerk for each of the justices should be left with him within that time.

Reg. v. *Knill* (1893) 57 J. P. 277 applied.

ORDER NISI in the nature of a mandamus to two justices of the county borough of Stoke-on-Trent to state a special case.

On July 30, 1925, on the hearing of an affiliation summons against the applicant, Albert Edward Fernihough, the justices made an order requiring him to pay 20*s.* a week to the

(1) (1865) 17 Ir. C. L. 74. (2) [1924] A. C. 625.

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complainant until a child of hers should reach the age of sixteen years, and also to pay 11*l.* 5*s.* costs.

At the conclusion of the hearing a verbal application was made to the justices on behalf of the applicant to state a case on the ground that their determination was erroneous in law and in excess of jurisdiction, inasmuch as they had decided that the applicant's defence of res judicata arising out of the dismissal of each of two previous summonses against him by the complainant in respect of the same matter had been dismissed, and had decided that there was some corroboration of the complainant's evidence; and the justices then orally consented to state a case.

On July 31, 1925, an application to the justices under the Summary Jurisdiction Acts, 1857 and 1879, to state a special case was made on behalf of the applicant in writing, and was left with the clerk of the justices without copies thereof for the justices. On August 10, 1925, the applicant entered into the statutory recognizance. On August 11, 1925, the clerk, in compliance with a request made to him on behalf of the applicant, made and sent to the justices copies of the said application, no such copies having previously been left with the clerk for the justices.

On March 4, 1926, an application was made to the justices on behalf of the applicant to state the case, and they intimated by their clerk that they would do so if the applicant would furnish security for costs, but not otherwise.

On March 30, 1926, the applicant obtained an order nisi calling upon the justices and the complainant to show cause why the justices should not state and sign a case, on the grounds that they were wrong in refusing to state a case unless further security were given, and that they were bound to state the case without imposing any such condition. Notice of the order nisi was to be given to the justices and to the said complainant.

R. S. T. Chorley showed cause. The order nisi should be discharged. The applicant is not entitled to require the justices to state a case, because in making his application he

did not comply with the requirements of r. 52 of the Summary Jurisdiction Rules, 1915–1922, which provides that: "An application to a court of summary jurisdiction . . . . to state a special case shall be made in writing and shall be left with the clerk of the court at any time within seven clear days from the date of the proceedings to be questioned, and there shall also be left with him a copy of such application for each of the justices constituting such court which shall be duly forwarded by him to each of the said justices." That rule on its true construction requires not only that the original application should be left with the clerk of the court within seven clear days from the date of the proceedings to be questioned, but also that the copy of the application for each of the justices should be left with the clerk within that time. The former rule, namely, r. 18 of the Summary Jurisdiction Rules, 1886, provided that: "An application to a court of summary jurisdiction . . . . to state a special case shall be made in writing, and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned." Under that rule it was held that the copy must be served on the justices' clerk within seven clear days as well as the original on the justices: *Reg.* v. *Knill* (1); and that the application must be made to each of the justices within the seven clear days: *Westmore* v. *Paine* (2) and *South Staffordshire Waterworks Co.* v. *Stone.* (3) Similarly, it should be held that on the true construction of the present rule a copy of the application for each of the justices should be left with the clerk within the seven clear days. Here, the copies of the application for the justices were not left with the clerk within that time, and, therefore, the application for the case was not regularly made.

D. N. Pritt in support of the order nisi. The order nisi should be made absolute. The applicant is not prevented from requiring the justices to state a special case by any failure on his part to comply with the requirements of r. 52

(1) 57 J. P. 277. (2) [1891] 1 Q. B. 482.
(3) (1887) 19 Q. B. D. 168.

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of the Summary Jurisdiction Rules, 1915–1922. As that rule imposes restrictions upon a person applying for a special case it should be strictly construed in his favour.

On the true construction of the rule the provision that there shall be left with the clerk of the court a copy of the application for each of the justices is only directory and not compulsory, and does not introduce a condition precedent to the right to make the application. If the original application has been duly left with the clerk the provision of copies for the justices is a mere matter of convenience. The rule is merely a rule of practice relating to the making of the application, and it would be wrong to hold that failure to comply with the provision as to leaving copies for the justices should have the effect of destroying the right of the applicant to ask for the case or the jurisdiction of the justices to grant it. The last provision of the rule—namely, that the case shall be stated within three calendar months after the date of the application, has been held to be directory, and there is no ground for holding that the provision now in question is more compulsory than that last provision. Even if the provision as to leaving with the clerk a copy for each of the justices be compulsory, it does not require that the copies left for the justices should be left within seven clear days of the proceedings to be questioned or within any other specified time. It would be useless to require that these copies should be left with the clerk within the seven days when there is no requirement that they should be forwarded by the clerk to the justices within any given time. All that the rule requires is that the original application be left with the clerk within the seven days, and that copies of it be made and left with him for the justices within a reasonable time before they can be required to state the case. Here the applicant made the original application and left it with the clerk the day after the proceeding to be questioned, and the clerk if he had chosen to do so might himself at once have prepared copies for the justices. Moreover, the applicant within eleven days from the proceedings to be questioned asked the clerk to make and send copies of the application

to the justices, and the clerk did so, and copies for the justices were thus left with the clerk within a reasonable time.

The former rule, r. 18 of the Summary Jurisdiction Rules, 1886, was very different from the present rule, and neither that rule nor the decisions upon it afford any guidance as to the construction of the present rule. That rule was the converse of the present rule and provided that an application to a court of summary jurisdiction to state a special case should be made in writing, and a copy left with the clerk, and might be made at any time within the seven days. The true meaning of that rule was that the applicant should make an application in writing to each of the justices, and should leave the written copy for each justice with the clerk within seven days. Under that rule the service of an application on each of the justices within the seven days was a separate condition precedent to the applicant's right to a case. Under the present rule the original application is left with the clerk within the seven days, and it is only a secondary copy of it that is left for each of the justices. One of the objects of the present rule is to substitute for several conditions precedent under the older rule, one condition only—namely, service of the application on the clerk within the seven days.

LORD HEWART C.J. This is a rule nisi for an order in the nature of a mandamus directed to two justices for the county borough of Stoke-on-Trent and another requiring them to show cause why the justices should not state a case for the opinion of this Court. The grounds on which the rule nisi was obtained were that the justices were wrong in refusing to state a case unless further security were given by the applicant, and that they were bound to state a case without imposing any such condition. The affidavits and the arguments of counsel have, however, disclosed a question of a more formidable character. It is now established that according to a certain construction of r. 52 of the Summary Jurisdiction Rules, 1915–1922, a provision as to time was not complied with by the applicant in making his application for the case. The answer to the question whether or not that

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provision exists depends upon the true construction of the rule. The rule, so far as relevant, is as follows: "An application to a court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing and shall be left with the clerk of the court at any time within seven clear days from the date of the proceedings to be questioned, and there shall also be left with him a copy of such application for each of the justices constituting such court which shall be duly forwarded by him to each of the said justices." In the present case it is common ground that the copies of the application for the justices were not left with the clerk of the court within seven clear days from the date of the proceedings to be questioned. The contest, therefore, is whether or not the limitation of seven clear days applies to the copies of the application as well as to the application itself.

The rule in question is the successor of an older rule, which was couched in somewhat different language and contemplated a different procedure. That was r. 18 of the Summary Jurisdiction Rules, 1886, which was in these terms: "An application to a court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case, shall be made in writing, and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned. . . . ." In the rule so framed the words "and a copy left with the clerk of the court" formed a parenthesis within commas between the first part of the rule providing that "An application . . . . to state a special case, shall be made in writing," and the remainder of the rule providing that the application "may be made at any time within seven clear days. . . . ." The limitation of seven clear days was not applied plainly and unmistakably to the leaving of a copy with the clerk of the court. It was held, however, that the limitation applied to the copy of the application as well as to the original application. It is said now that the phrasing of the more modern rule is so different from that of the former rule that the limitation of seven clear days no

longer applies to the copy. It seems to me that that argument fails. At the time when the later rule was framed the older rule had not only been in existence for a long time, but it had been judicially construed to mean that the limitation applied to the copy of the application, though not there applied to it in the clearest terms. The new rule, after providing that the application shall be left with the clerk of the court at any time within seven clear days, goes on to provide "and there shall also be left with him a copy of such application for each of the justices." The rule does not say that within a reasonable time there shall be left with the clerk a copy for each of the justices. In my judgment the limitation of time applies to the copies of the application no less than to the application itself.

Reference was made during the argument to the case of *Reg.* v. *Knill* (1), decided in 1893, the effect of which I have already noticed. It was there held under the former rule that the copy must be served on the justices' clerk within the seven days as well as the original on the justices. That decision has remained unimpaired since the time when it was pronounced. The reasons for putting a strict interpretation upon the language of the older rule are, it seems to me, equally applicable to the language of the modern rule. In *Westmore* v. *Paine* (2), where it was held under the older rule that an appellant who had been convicted by five justices and made an application for a case to two of them only had not complied with the terms of the rule, it was pointed out by Pollock B. that it was not enough to serve the application on two only of the five justices, because then "any two members of the court, even if they differed from the opinion of the majority, might state a case, and the manner in which it was stated might depend on the views of those members of the court who undertook to state it. The case could not be properly said to have been stated by the court." In like manner it is now necessary under the present rule that a copy of the application be supplied for each of the justices, notwithstanding that the clerk of

(1) 57 J. P. 277. (2) [1891] 1 Q. B. 482, 484.

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the justices receives the original application. I think therefore that the limitation of seven clear days applies to the leaving of the copies of the application for the justices, as well as to the leaving of the application itself.

It is not necessary now to decide the further question whether the limitation of time amounts to a condition precedent the fulfilment of which is essential in order that the justices may state a case. One day it may be necessary to decide that question. At present it is enough to say that where the rule is not complied with the Court ought not in its discretionary power to order the justices to state a case.

In my opinion this order nisi should be discharged.

SALTER J. I entirely agree.

FINLAY J. I agree.

Order Nisi discharged.

Solicitors: *B. Wilkinson, for G. E. Phillimore, Hanley; Doyle, Devonshire & Co., for J. M. Shaw, Leek.*

J. R.

1926
July 23.

THE KING *v.* HASLEWOOD.

Ex parte MARGERISON.

Coroner—View of the Body—Condition precedent to holding of Inquest—Coroners Act, 1887 (50 & 51 *Vict. c.* 71), *ss.* 4, 6.

A coroner has no authority to take an inquisition of death without a view of the body, and any inquest held by him without such view is absolutely void.

RULE NISI calling upon Mr. D. H. Haslewood, one of H.M. coroners for the county of Lancaster, to show cause why a writ of certiorari should not issue to remove into the High Court of Justice, in order to be quashed, a certain inquisition taken before the coroner on March 17, 1926, on the body of G. F. Margerison, and why another inquest should not be held touching the death of the said G. F. Margerison. The

rule was moved at the instance of the father of the deceased boy upon the ground that by reason of irregularity of proceedings and insufficiency of inquiry it was necessary and desirable in the interests of justice that another inquest should be held.

There was also an application under s. 6 of the Coroners Act, 1887, under the authority of the Attorney-General, for an order directing another inquest to be held touching the death of G. F. Margerison on the grounds of alleged irregularity of proceedings and insufficiency of inquiry arising from the failure of the coroner to view the body of the deceased at the inquest held on March 17, 1926.

The coroner in an affidavit stated that owing to certain circumstances, which he narrated, and not through his own fault, he arrived fifteen minutes late at the place where the inquest was to be held. He was told that the jury were assembled in readiness for the inquest and that they had already viewed the body. In those circumstances he held the inquest without himself viewing the body. He expressed his sincere regret to the Court for his omission. He said that he had not in his mind the provisions of s. 4, sub-s. 1, of the Coroners Act, 1887, or he would not have acted as he did; but added that as he himself had no medical knowledge, and as he was already in possession of the doctor's report of his examination, he thought that no examination of his own would have been of any more service than that of the jury.

The jury returned a verdict that the deceased had shot himself with a revolver, but that there was no evidence to satisfy them as to the state of his mind when he shot himself.

The father of the deceased boy in an affidavit said that he was of opinion that in consequence of the coroner having failed to view the body a miscarriage of justice had occurred, that the verdict of suicide was not justifiable, and that there was a serious error in the evidence of the doctor which would not have passed uncorrected had the coroner viewed the body.

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Roland Oliver K.C. and *Harold Derbyshire*, for the coroner, showed cause against the rule. In this case the coroner unfortunately did not view the body, owing to the fact that he was late not through his own fault, and that he forgot the provisions of s. 4 of the Coroners Act, 1887 (1); but the jury had already viewed the body. It was laid down in 1819 in *Rex* v. *Ferrand* (2) that a coroner has no authority to take an inquisition of death without a view of the body, and that any inquest taken by him without such view is void as being an extrajudicial proceeding. The point that the inquest was a nullity because the coroner did not view the body is not open in this case, as it was not taken when the rule for a certiorari was moved, and it is not stated as one of the grounds of the rule.

[AVORY J. The irregularity of proceedings referred to in the rule is the failure of the coroner to view the body.]

The law which existed before 1887 has now been changed by the passing of the Coroners Act, 1887. That Act provides in ss. 4 and 5 a complete code with regard to the duties of a coroner and jury the performance of which is necessary in order that a coroner's inquest shall be properly held. Reading ss. 4 and 6 together, if there has been any irregularity in the proceedings this Court will exercise its discretion in deciding whether another inquest should be held. Lord

(1) Coroners Act, 1887, s. 4, sub-s. 1: "The coroner and jury shall, at the first sitting of the inquest, view the body. . . . ."

Sect. 6, sub-s. 1: "Where Her Majesty's High Court of Justice, upon application made by or under the authority of the Attorney-General, is satisfied either—

(*a*) that a coroner refuses or neglects to hold an inquest which ought to be held; or

(*b*) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of enquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held,

the Court may order an inquest to be held touching the said death, and may, if the Court think it just, order the said coroner to pay such costs of and incidental to the application as to the Court may seem just, and where an inquest has been already held may quash the inquisition on that inquest."

(2) (1819) 3 B. & Al. 260.

Campbell L.C. said in *Liverpool Borough Bank* v. *Turner* (1) that "no universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed." The provision in s. 4 that the coroner and jury shall view the body is merely directory, and is not obligatory in the sense that if it is not obeyed the inquest is null and void. The Coroners Act altered the previous law in this respect and put a failure to view the body in the same category as the other reasons set out in s. 6, sub-s. 1 (*b*), for the Court exercising its own discretion whether or not the holding of another inquest is necessary or desirable in the interests of justice. The viewing of the body by the coroner is not now a condition precedent to the holding of an inquest, it merely amounts to an irregularity of proceedings. It is not so serious as fraud, which is expressly mentioned in s. 6, sub-s. 1 (*b*), as one of the grounds upon which this Court can exercise its discretion whether or not to order the holding of another inquest.

[LORD HEWART C.J. referred to *Reg.* v. *Ingham.* (2)]

Under the Coroners Act the Court has a discretion, and will not quash an inquest already held and order the holding of another inquest unless the Court considers it necessary that one should be held. Even if it should be held that this inquest was a nullity because of the failure of the coroner to view the body and that it must therefore be quashed, the Court is not bound to order another inquest to be held, and having regard to the circumstances in this case there is no necessity for the holding of another inquest.

Sir H. Curtis Bennett K.C. and *P. B. Morle* in support of the rule, were not called upon.

(1) (1860) 30 L. J. (Ch.) 379, 380. (2) (1864) 5 B. & S. 257.

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LORD HEWART C.J. This is a rule nisi for a writ of certiorari to remove into this Court a certain inquisition taken by one of H.M. coroners for Lancashire on March 17, 1926, on the body of George Frederick Margerison. Coupled with this application for a writ of certiorari is an application under s. 6, sub-s. 1, of the Coroners Act, 1887, for an order that another inquest be held. It is not necessary to restate all the facts of the case. One thing clearly appears. It is common ground, and it is the subject of a very proper expression of regret by the coroner, that for the reasons explained and in the circumstances described by him in his affidavit there was in this case no view of the body by the coroner himself. Before the passing of the Coroners Act, 1887, it was clearly laid down that a view of the body by the coroner and the jury was a condition precedent to the holding of an inquest. It was laid down in *Rex* v. *Ferrand* (1) in 1819 that a coroner can take an inquest only super visum corporis, and that an inquest not so held is absolutely void. That continued to be the law. It is, however, urged by Mr. Roland Oliver with great force that since the passing of the Coroners Act, 1887, that proposition has ceased to be true; that the scheme of that Act is that ss. 4 and 5 enumerate all the duties of a coroner and a jury the performance of which is necessary for the holding of a coroner's inquisition; and that thereafter s. 6 provides in sub-s. 1 (*b*) that when an inquest has been held the Court may be satisfied upon the grounds there specified, including "irregularity of proceedings," that it is necessary or desirable in the interests of justice that another inquest should be held. It was contended therefore that a failure to view the body is in the same category with the other irregularities specified in that section, and that if there has been no view of the body in this case still there has been an inquest, although there was an irregularity in the proceedings, and that it is not necessary for this Court in the exercise of its discretion to order the holding of another inquest.

(1) 3 B. & Al. 260.

In my opinion that contention cannot be upheld. It is still the law that a view of the body by both the coroner and the jury at the first sitting of the inquest is an essential preliminary to the taking of evidence and the holding of an inquest. If that condition precedent is omitted it is not an irregularity in the proceedings, but a failure to commence the proceedings at all; it is a failure from the very beginning. It is to be observed that the editor of the 6th edition of Jervis on Coroners, which was published in 1898, in commenting upon the Coroners Act, 1887, reproduced at p. 27 what had formerly been regarded as the correct view of the law in these terms: "Although the repealed statute de officio coronatoris did not say expressly that the coroner must take his inquest on the view of the dead body, and that an inquest otherwise taken by him was void, yet it was clearly laid down by all the books that a coroner has no authority to take an inquest of death without a view of the body, and that if he do so, the inquisition is void, as being an extrajudicial proceeding." The editor then adds this observation: "And the same principle appears to be applicable under the present Act." That seems to be the true view of the law. In these circumstances it is inaccurate to say that there has been an inquest. The question is not whether one inquest marred by an irregularity should be followed by another inquest, but whether what has taken place is really an inquest. In my opinion what has taken place comes under s. 6, sub-s. 1 (*a*), of the statute and not under sub-s. 1 (*b*), and there has been a failure on the part of the coroner to hold an inquest at all. In these circumstances I think it is clear that this inquisition must be quashed and the rule must be made absolute. Moreover, as there has been hitherto no real inquest there must be an inquest. There is evidence that there has been a violent or non-natural death, and this death has not been the subject of an inquiry, because what has already taken place is not an inquest. Therefore there must be an order that an inquest shall be held, and not that another inquest shall be held, and having regard to all the facts I see no reason why that inquest

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should not be held by the coroner who inadvertently made a slip.

AVORY J. I agree and have nothing to add.

SALTER J. I agree.

Rule absolute. Inquisition quashed. Order for inquest to be held.

Solicitors in support of rule: *James, Mellor & Coleman, for Oddie & Roebuck, Blackburn.*

Solicitors for coroner: *John Taylor & Co., Blackburn.*

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.

1926

June 8, 9, 10.

FALCON *v.* FAMOUS PLAYERS FILM COMPANY.

Copyright—Dramatic Work—Foreign Author—Place of First Performance—Performing Right—Title to before Copyright Act, 1911*—Preservation thereby of existing Rights—Infringement, by performing—By authorizing Performance—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1, 2, 3; *s.* 2, *sub-s.* 1; *s.* 24, *sub-s.* 1, *Sch. I.*

In 1885 an American subject wrote a dramatic piece which was afterwards registered at Stationers' Hall as having been performed on February 20, 1886, in London. If that entry in the register was correct, it was first performed in this country. At the date of that performance the author was not resident here. In 1898 the author assigned to the plaintiff the sole performing right in the play for the United Kingdom. In 1919 the author sold to the defendants, who were film companies, the motion picture rights of the play throughout the world. The defendants made a film of the play in America, imported it into England, and purported to let the right to exhibit it to the proprietor of a picture theatre. The hiring agreement provided that the hirer should not order the posters used for advertising the exhibition from any one but the defendants, and also that the hirer should pay the rent not later than the final day of exhibition. In an action to restrain the defendants from infringing the plaintiff's performing right the defendants, who did not claim any exclusive right in themselves to exhibit the film in this country, denied that the plaintiff had any such right, and further alleged that if he had such a right they had not infringed it:—

Held (1.), That in 1886, having regard to the Copyright Acts in force at that date, it was not a necessary condition to the acquisition by a

foreign author of a play of a title to the performing right that he should have been resident in this country at the time of its first performance; it was enough that it was first performed here.

(2.) That the entry of the play in the register at Stationers' Hall was prima facie proof, under s. 11 of the Copyright Act, 1842, not merely of the person entitled to the proprietorship, but also of the date and place of first performance, and that consequently in the absence of evidence to the contrary the author had a good title to convey to the plaintiff.

(3.) That the title to the performing right which the plaintiff so acquired was not taken away by the Copyright Act, 1911. The provision of s. 1, sub-s. 1, of that Act, that copyright shall subsist only in words which satisfy the conditions of that sub-section, must be understood as applying only to works coming into existence after the passing of the Act, copyright in works existing at that date being unconditionally preserved by s. 24 and Sch. I.

(4.) That the acts of the defendants amounted to an infringement of the plaintiff's performing right:—

By Bankes and Atkin L.JJ. on the ground that the defendants had authorized the theatre proprietor to perform the play, and in so doing had infringed the plaintiff's sole right to authorize the performance.

By Scrutton L.J. on the ground that, as the hiring agreement provided that the rent should be payable only upon exhibition of the film, the defendants thereby impliedly stipulated that the hirer should exhibit, and the imposition of that obligation on the hirer amounted to a performance of the play by the defendants themselves.

Judgment of McCardie J. affirmed.

APPEAL from a judgment of McCardie J. (1).

In 1885 a Mr. William Gillette, an American actor and dramatic author, wrote a play called "Held by the Enemy." In 1898 negotiations took place between a Mr. W. Lestocq, who was then acting as agent in the United Kingdom for Mr. Gillette, and the plaintiff, Mr. Falcon, for the acquisition by the latter of the performing rights in that play for Great Britain and Ireland. As a result a written agreement, dated June 30, 1898, was entered into between Mr. Gillette and the plaintiff, and signed by both parties. It recited that Mr. Gillette was the "author and the sole proprietor of the right of performing the play entitled 'Held by the Enemy,'" and provided that for the sum of 150*l.* Mr. Gillette granted to the plaintiff "the sole and exclusive right to perform or have performed the said play entitled 'Held by the Enemy' in Great Britain and Ireland." The plaintiff, who was

(1) [1926] 1 K. B. 393.

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anxious to make quite certain that Mr. Gillette was entitled to the performing right in this country, which he purported to grant, pressed Mr. Lestocq to ascertain from Mr. Gillette the date and place of first performance of the play. On September 22, 1898, Mr. Lestocq wrote to the plaintiff: "I have this morning heard from Mr. Gillette, and he informs me that 'Held by the Enemy' was played in this country at Ladbroke Hall, Notting Hill, on Saturday, February 20, 1886, and performed in America on Monday, February 22, 1886, therefore you will see that the copyright is clear." On September 6, 1919, an agreement was made between Mr. Gillette and the Famous Players Lasky Corporation, a body corporate of the United States engaged in the manufacture of films. The agreement, after reciting that Mr. Gillette "represents that he is the sole owner of the motion picture rights throughout the world in and to a certain original play entitled 'Held by the Enemy,' written by the said William Gillette," purported to grant to the corporation "all the motion picture rights" in the said play throughout the world, and contained an express warranty that Mr. Gillette had full right to make the said grant. For that grant the corporation paid to Mr. Gillette the sum of 4000*l.* Acting under that agreement the corporation made in the United States a film of the play "Held by the Enemy." They then sent over to the Famous Players Film Co., who were an English company, the negative and two positives of the film. That company made further copies of the film and handed them to the Famous Lasky Film Service, Ld., also an English company, for the purpose of being let out in the United Kingdom. Early in 1922 the last mentioned company entered into an agreement with Mr. Robert Chetham, the proprietor of a picture theatre at Bedford, for the letting on hire to him of the right to exhibit the said film on three specified days for the sum of 20*l.*, "which sum the hirer agrees to pay on the first day of exhibition of the said film, and in any event not later than the final day of such exhibition." Attached to the agreement was a form of order for posters to assist in advertising the exhibition, and the agreement

provided that the hirer should not order posters from any persons other than the said company. Chetham sent to the company an order for posters, which were supplied, and on the specified dates he exhibited the film accordingly. On May 17, 1923, the plaintiff brought this action against the Famous Players Film Co. for infringing the copyright of the said play, and on February 12, 1925, the writ was amended, the Famous Lasky Film Service, Ld., the Famous Players Lasky Corporation, and Mr. Chetham being joined as co-defendants. The plaintiff claimed an injunction, an account, delivery up of the film, and damages. The defendants in their pleading did not set up any title to exhibit the film derived from Gillette, but denied that the plaintiff was entitled to the performing right. They also denied infringement. At the trial before McCardie J., it being disputed that the play was first performed in this country, the plaintiff tendered in evidence the above mentioned letter of September 22, 1898, from Lestocq to the plaintiff, as being an admission against interest by the defendants' predecessor in title. He also tendered a certified copy of an entry in the book of registry kept at Stationers' Hall, made on March 7, 1887, relating to a dramatic piece entitled "Held by the Enemy," and stating: "Time and place of first representation or performance—20th February, 1886, Ladbroke Hall, Notting Hill, London, W.' But the entry stated as the "name and place of abode of author or composer—William Gillette, Hartford, Conn., U.S.A., and William Eugene Chapman, 6 York Street, Covent Garden, London," and as the "Name and place of abode of proprietor of sole liberty of representation or performance, William Eugene Chapman, 6 York Street, Covent Garden." McCardie J. held that the letter of September 22, 1898, was admissible in evidence against the defendants as an admission by their predecessor in title, and upon that admission, corroborated by the entry at Stationers' Hall in March, 1887, he found that the play was first performed in this country. In those circumstances he held that Gillette under the Dramatic Copyright Act, 1833, acquired the sole performing right in this country, notwithstanding that he was

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not resident here at the time of the first performance. He further held that upon the passing of the Copyright Act, 1911, the plaintiff, as Gillette's assignee, was not deprived of the performing right so acquired under the Act of 1833 by the fact that the right claimed did not satisfy the conditions required by s. 1 of the Act of 1911. (1) Having held the plaintiff's title established he found that his performing right had been infringed by all four of the defendants, and gave judgment accordingly.

The defendants appealed.

Maugham K.C., Sir Duncan Kerly K.C. and *Macgillivray*

(1) By the Copyright Act, 1911, s. 1, sub-s. 1: "Subject to the provisions of this Act, copyright shall subsist . . . . in every original literary dramatic musical and artistic work, if:

(*a*) In the case of a published work, the work was first published within . . . . His Majesty's dominions; and

(*b*) In the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within His Majesty's dominions;

but in no others" (with an exception not material to the present case).

Sub-s. 2: "For the purposes of this Act 'copyright' means the right to produce or reproduce the work . . . . to perform the work . . . . and shall include the sole right . . . .:

(*d*) In the case of a . . . . dramatic work to make any . . . . cinematograph film or other contrivance by means of which the work may be mechanically performed. . . . .

And to authorize any such acts as aforesaid."

Sub-s. 3: "For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work."

Sect. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright."

Sect. 24, sub-s. 1: "Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, ... he shall as from that date be entitled to the substituted right set forth in the second column of that schedule."

In the first column of Sch. I. appear the words: "Performing right but not copyright," opposite to which in the second column are the words: "The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act."

Sect. 35: "In this Act, unless the context otherwise requires:—

'Performance' means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument."

for the appellants. The plaintiffs had no title to the performing right in the play, for Gillette never had any dramatic copyright in it, and therefore had nothing to assign, for the following reasons: Gillette was an alien resident abroad in 1886, at the time when it is said that the play was first performed. In *Jefferys* v. *Boosey* (1) the House of Lords decided that under the statute 8 Anne, c. 19, an alien author of a book could not acquire any British copyright in it unless the book was first published in this country and unless also he was temporarily resident here at the time of such publication, the object of the statute being to encourage literature among British subjects, which description included such foreigners as by residence here owed a temporary allegiance to the Crown. The decision is in effect equally applicable to the sole liberty of representing a dramatic piece not printed or published, which was conferred on its author by the Dramatic Copyright Act, 1833; the word "author" must have the same meaning in both Acts, for such an Act is prima facie passed for the benefit of British subjects, including those aliens owing temporary allegiance. In *Routledge* v. *Low* (2), which was a decision as to copyright in a book under the later Copyright Act of 1842, it was held by all the Lords that under the provisions of that Act an alien friend was entitled to British copyright in a book of which he was the author and which was first published in the United Kingdom, provided he was at the time of such publication resident in a British colony. There the author was an American lady, who went to reside in Canada at the time of the publication of her book in the United Kingdom. But Lord Cairns and Lord Westbury went further, and were of opinion that having regard to the difference in the preamble of the Act from that of the statute of Anne, the term "author" in the later Act included foreign authors, although resident outside of the British dominions at the time of first publication. Lords Cranworth and Chelmsford, on the contrary, were of opinion that the term meant the same thing as in the statute of Anne. It is not material here to consider which

(1) (1854) 4 H. L. C. 815. (2) (1868) L. R. 3 H. L. 100.

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of those two views is right, for they had reference only to copyright in books, and the question here is as to the person entitled, not to the copyright in a book, but to the performing right in a play. The Act of 1842 had nothing to do with the aquisition of a title to performing right, and the opinions of the two first named Law Lords, which turned entirely upon the language of the preamble to that Act, stating that the object of that Act was "to afford greater encouragement to the production of literary works of lasting benefit to the world," can have no bearing on the construction to be put on another Act passed some years before, and the preamble to which is in wholly different terms. It is contended that the law as laid down in *Jefferys* v. *Boosey* (1) still applied in 1886 to the right of performance of a dramatic piece. But even if it was unnecessary at that date that the author of a dramatic piece should have been resident in the United Kingdom at the time of first publication, and if it was enough that it should have been first published here—which expression "first published" was under s. 19 of the International Copyright Act, 1844 (7 Vict. c. 12), to be understood as meaning, in the case of a play, "first performed": *Boucicault* v. *Chatterton* (2),—there is no evidence in this case that the play was first performed here. The plaintiff relies on two things as evidencing that fact; first, the certificate of registration under s. 11 of the Copyright Act, 1842, of a play entitled "Held by the Enemy" in 1887, which states that the time and place of first performance was "February 20, 1886, Ladbroke Hall, Notting Hill, London," that date being admittedly two days before the first performance in the United States. But the register is not prima facie evidence of the date and place of first performance, for those facts go to the existence of the copyright, whereas the register is only stated in the section to be evidence of "the proprietorship or assignment of copyright or licence as therein expressed," not of its existence. Further, the register relied on must be referring to a different play from that of which the rights were assigned to the

(1) (1854) 4 H. L. C. 815. (2) (1876) 5 Ch. D. 267.

plaintiff. The latter was by Gillette alone, whereas the registered play is stated to be by Gillette and one Chapman jointly. Gillette says he never wrote a play jointly with Chapman and knew nothing about him. The explanation probably is that, in view of a belief that seems to have prevailed at that date that an American author could not have copyright in a play the authorship of which was not partly by a British subject, Chapman, who was a British subject resident here, made some alterations in the original play, and if the alterations were sufficiently substantial to justify him in registering himself as part author the play was a different play, and the register does not assist the plaintiff. The other matter which is said to be evidence of the first performance having been in this country is the letter which was written by Lestocq to the plaintiff on September 22, 1898, in which he told him that his copyright was secure, as the English first performance was two days before the American. That is relied on as an admission. But it is not admissible as such, for it was made at a time when Gillette, whose agent Lestocq was in writing the letter, was no longer interested in the performing right of the play. Gillette had already parted with that right to the plaintiff two months before by a written agreement of June 30. The reason for holding an admission to be evidence is that being against the maker's interest it is more likely to be true, and consequently it is not admissible, " unless it is made during the continuance of the interest that entitles him to make it " : Stephen's Digest of the Law of Evidence, Art. 16. But even if the assignment to the plaintiff was to be regarded as still in negotiation on September 22, the letter was not admissible, for it was not against Gillette's interest. It was a mere assertion of a right, a statement that he had a good title to convey. But, assuming that it was against his interest, still it was not evidence against the defendants, for an admission is only available as evidence against the person making it and those claiming under him, and here the defendants do not claim under Gillette, but against him. It is true that the defendant corporation had purchased

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the exclusive motion picture rights in the play from Gillette for a sum of 4000*l.*, but finding that in consequence of the earlier assignment to the plaintiff those rights were valueless so far as England was concerned, they repudiated any title under Gillette. So far from pleading it, they set up a case which was wholly inconsistent with it—namely, that Gillette never had any copyright to assign to them or to any one else. Their case was that the performing rights were common property, and that in making and exhibiting films of the play they were only doing what any one of the public was entitled to do.

But even if the above contentions are unsound, and if the plaintiff down to 1911 was entitled to the performing right in this country, his right was taken away by the Copyright Act of that year, and the "substituted right" conferred by s. 24 and Sch. I. of that Act does not cover the performing rights in this play, for the acquisition of such substituted right is conditional on the claimant of it establishing that he has satisfied the provisions of s. 1. By s. 1, sub-s. 1: "Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends . . . . in every original . . . . dramatic . . . . work if (*a*) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and (*b*) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid; but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries." There was indeed an Order in Council made in 1915 relating to the United States, but its provisions do not assist the present plaintiff. Under those circumstances the plaintiff must show that he comes within sub-s. 1 (*a*) or sub-s. 1 (*b*). A work must be either published or unpublished, and by sub-s. 3: "For the purposes of this Act publication, in relation to any work, means the issue of copies of the work

to the public, and does not include the performance in public of a dramatic or musical work " ; that is to say, in the case of a play it means " published as a book." Here the plaintiff cannot bring himself within (*a*), because, although a printed copy of the play was produced by the defendants and put to him in cross-examination, he was unable to show that it was printed for publication, or that, if it was, it was first published within His Majesty's dominions. Nor can he bring himself within (*b*), for he was unable to show that at the date of " the making of the work," which presumably means its composition, he was resident within His Majesty's dominions.

If however the defendants are wrong in the above contentions, and the plaintiff has established his title to the sole performing right in the play, the first three defendants, the three companies, deny that they have done any act amounting to an infringement of that right. The making of the film was not an infringement of the plaintiff's performing right, nor was the importation of the film, nor was the letting of it on hire to Chetham, even though it was contemplated that Chetham would exhibit it, for Chetham was to exhibit it on his own account and not on account of the other defendants. *Karno* v. *Pathé Frères* (1) is still good law under the Act of 1911, and is an authority in the defendant's favour. There the defendants manufactured films which represented a music hall sketch of the plaintiffs, and sold them to the proprietors of music halls, knowing that the purchasers bought them for the purpose of public exhibition. But it was held that they had not infringed the plaintiffs' copyright, not having " caused them to be represented " within the meaning of s. 2 of the Act of 1833. Those words, " cause to be," as was held in *Russell* v. *Briant* (2), only apply to a case where the persons actually representing are the defendant's agents. In *Lyon* v. *Knowles* (3) the licensed proprietor of a theatre, who let the use of it to another person who performed in it plays in breach of the plaintiff's copyright, was held not liable for causing the plays to be represented.

(1) (1909) 100 L. T. 260. (2) (1849) 8 C. B. 836.
(3) (1863) 3 B. & S. 556.

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The change of language in the Act of 1911, substituting "authorise" for "cause," does not alter the position. The one term is no wider than the other. In *Performing Right Society* v. *Ciryl Theatrical Syndicate* (1) the managing director of a company, who were lessees of a theatre, engaged on behalf of the company a band to perform the incidental music. In his absence and without his knowledge they performed pieces the copyright of which was vested in the plaintiffs. It was held that as the band were the servants or agents of the company, and not of the defendant, he could not be held to have "authorised" the performances.

Upjohn K.C., *Merriman K.C.* and *Storry Deans* for the respondent. There is sufficient evidence that the play was first performed in England. The letter of September 22, 1898, written by Gillette's agent, was admissible, as being an admission by Gillette against his interest made at a time when he was still interested in the English performing right. Lestocq had on June 30 entered into an agreement to assign the performing right to the plaintiff, but between that date and September 22 the plaintiff was pressing him to supply him with the dates of first performance in this country and in the United States, and Gillette had not executed the actual assignment, so that the matter was still in negotiation when the letter was written, and it was in consequence of the statement it contained as to the date that the plaintiff completed the purchase. That statement so made was against Gillette's interest, because it limited the area of his copyright and negatived his right thenceforward to grant the performing right in this country to any one else. Secondly, the certificate of registration is evidence of the date and place of first performance. Apart from the provisions of s. 11 of the Copyright Act, 1842, an entry in a public register is evidence of the facts stated in it, though even under that section the facts of which the certificate is to be prima facie proof are not confined to the proprietorship and assignment.

Then if the plaintiff had a good title the defendants have infringed it. By s. 1, sub-s. 2, of the Act of 1911, copyright

(1) [1924] 1 K. B. 1.

includes the sole right to perform the work or to authorize the performance, and by s. 2, "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." In the case of performing right then the right is infringed by any person who, without the consent of the owner of that right, either performs or authorizes the performance. Here the defendants have done both. For this purpose all the first three defendants are to be treated as on the same footing, it having been conceded by the other side that no distinction was to be drawn between them. They made the film, imported it into this country, prepared a mass of advertising matter connected with its production, and hints as to its exploitation. They then entered into an agreement with the fourth defendant, Chetham, that the company should grant to him the right to exhibit the film for three specified days for the sum of 20*l.*, which sum was to be paid on the first day of exhibition or not later than the last. In order to give a business efficacy to that agreement, within the rule in *The Moorcock* (1), it is necessary to read into it an implied obligation on the part of the hirer to exhibit, for otherwise the company would not become entitled to their rent. The agreement further provided that the hirer should not purchase posters from any other person than the company. The company sent the hirer a form of poster order; an order was then given by him, and posters were supplied. These facts together amounted to "performance" by the three first defendants themselves, constituting them joint tortfeasors along with Chetham. But even if they did not actually perform the play themselves they "authorised" its performance. The introduction of that word in the Act of 1911 was to get rid of the decision in *Karno* v. *Pathé Frères* (2), and the effect of the limited construction which was there put on the words "cause to be represented" in the earlier Act. It must be conceded that the facts in the present case are indistinguishable from those

(1) (1889) 14 P. D. 64. (2) 100 L. T. 260.

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in *Karno's* case, but that case is no longer law. In *Monckton* v. *Pathé Frères* (1), where the defendants sold gramophone records of a musical work of the plaintiff, it was held that in so doing they infringed the plaintiff's copyright. Buckley L.J. said: "Copyright includes the sole right to authorise the performance of the work. The seller of a record authorises, I conceive, the use of the record, and such use will be a performance of the musical work." That case was followed in *Evans* v. *Hulton* (2), where a person, who sold to a firm of publishers the serial rights in certain stories written by the plaintiff, was held to have infringed the copyright by authorizing the printing and publication. Tomlin J. there adopted the definition of the word "authorise" given in the Oxford Dictionary, "To give formal approval to, to sanction, approve, countenance." That word is not, like the word "cause," limited to the giving of directions to a servant. A man who has no legal right to do an act himself may authorize another to do it, if that other believes that he is in a position to give him the legal right to do it, which was the case here.

Maugham K.C. in reply.

BANKES L.J. This is an appeal from a judgment of McCardie J., in which he dealt in detail with a number of points arising in connection with the law of dramatic copyright. The action was brought for an injunction to restrain the defendants from infringing what the plaintiff alleged was his sole right of performing a play called "Held by the Enemy," and for an account. The plaintiff's case was that he was entitled to that sole right of performance under an agreement, dated June 30, 1898, made between him and a Mr. Gillette, the author of the play, whereby Gillette assigned to him the performing right which he had acquired in February, 1886. The defendants answered that case first by saying that at the time Gillette was said to have acquired this performing right he was a non-resident alien, and by the law of this country was therefore incapable of acquiring it, and in support of that proposition they relied on the

(1) [1914] 1 K. B. 395, 403. (2) [1924] W. N. 130.

decision of the House of Lords in *Jefferys* v. *Boosey*. (1) That was a decision upon the proper construction of the statute of 8 Anne, c. 19. Later came the case of *Routledge* v. *Low* (2), also in the House of Lords, the decision in which was upon the law as it existed at the date when Gillette said he acquired his copyright. I agree with McCardie J. in thinking that *Jefferys* v. *Boosey* (1) does not correctly represent the law as it stood at that date, and that the true view is that of Lord Cairns and Lord Westbury in *Routledge* v. *Low* (2), that under the Copyright Act of 1842, which was the Act in force at the time that Gillette was said to have acquired his performing right, it was open to an alien, although non-resident, to acquire the sole performing right in a dramatic work, provided it was first publicly performed in this country. The second point taken by the defendants was that, even if that is so, there was no proof that this play was first performed in this country. The plaintiff answers that, first, by production of a certificate of registration issued in March, 1887, under the Copyright Act, 1842, which he contends is prima facie evidence of the time and place of the first performance. What the certificate purports to show is that this particular play was first performed on February 20, 1886, at the Ladbroke Hall, Notting Hill. Sect. 11 of the Act of 1842 provides for a book of registry being kept in which the proprietorship of the copyright in books and dramatic pieces may be registered, and that certified copies of entries in that register "shall be prima facie proof of the proprietorship of copyright as therein expressed." In my opinion the proprietorship of the copyright in this play as expressed in the certificate includes the time and place of first performance, because that is an essential part of the title. Unless it was in fact first performed at that place, and at that date, the author would have had no proprietorship. I think therefore that the certificate is prima facie evidence that the play was first performed in London on the date specified. But then it is said that the play "Held by the Enemy" mentioned in the certificate,

(1) 4 H. L. C. 815. (2) L. R. 3 H. L. 100.

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must be a different play from the play of that name which was assigned to the plaintiff, for the authors of the play in the certificate are there expressed to be, not William Gillette alone, but William Gillette and William Eugene Chapman, and as it must be assumed the entry was an honest one, Mr. Chapman must have had some substantial part in the authorship, in which case the play produced by their joint authorship cannot be the identical play written by Mr. Gillette alone. In the absence of other evidence that would be a formidable objection, but I think the other necessary evidence is supplied by a letter of September 22, 1898, if that letter is admissible. The agreement by which Mr. Gillette purported to assign the right of performance to the plaintiff, and which was dated June 30, 1898, appears from the correspondence to have been subject to the assignee being satisfied that his assignor was entitled to the right which he purported to assign. And on September 22 Mr. Lestocq, who was Mr. Gillette's agent and had made inquiries of him upon the subject, wrote to the plaintiff: "I have this morning heard from Mr. Gillette, who informs me that 'Held by the Enemy' was played in this country at the Ladbroke Hall, Notting Hill, on Saturday, February 20, 1886, and performed in America on Monday, February 22, 1886; therefore you will see the copyright is clear." That letter, read with the certificate, makes it perfectly plain that although the certificate includes Mr. Chapman's name, the play was the same play. The question then arises whether that letter is admissible. I should like to take the rule of law from Wills on Evidence (1), where it is said: "The same principle"—that is as to the admissibility in evidence of admissions—"has also been extended to statements affecting property, made by predecessors in title of the parties. Any statement made by the possessor of property of any description tending to limit in any way the complete and unfettered ownership thereof by him is deemed an admission, which may be given in evidence against any party who subsequently becomes entitled to it." It seems to me to be an answer to the objections that have

(1) 2nd ed., p. 173.

been taken to the admissibility of this document that it was written by Mr. Gillette's agent at a time when he was endeavouring to satisfy the assignee that the title which the assignee purported to give him was one which he had a right to assign, and under those circumstances I do not think it can be said that the letter was written on behalf of a person who had not such an interest in the matter at the time of writing it as would make it probable that the statements in it were true. But then it is said by the defendants that the statement in the letter is not against Mr. Gillette's interest but in his favour. Whether it is so depends upon the point of view from which you look at the matter. The defendants are in reality setting up against the plaintiff a title derived from Mr. Gillette, and the statement on which the plaintiff relies is a statement against Mr. Gillette's interest, in that it admits that he had no title to assign to the defendants a right which was in derogation of the right which he had already assigned to the plaintiff.

Then it is said that even if the plaintiff did acquire a good title at the time when the right was granted to him it was taken away by the Act of 1911. With that contention I am wholly unable to agree. It is founded upon the suggestion that although s. 24 of the Act of 1911 on the face of it purports to preserve existing rights it in effect does so only if those rights satisfy the condition of s. 1, sub-s. 1, that is to say, that if a dramatic work has been published as a book, the owner of the performing right will under sub-s. 1 (*a*) cease to have such right, unless the book was first published within the parts of His Majesty's dominions to which the Act extends, and that if it has not been published as a book his right would equally cease under sub-s. 1 (*b*), unless the author had been resident within His Majesty's dominions at the time of writing it; and it was said that there was no evidence that either of those requirements had been satisfied. That suggestion seems to me to defeat the obvious intention of the Legislature. Sect. 24 says that: "Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column

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of the First Schedule to this Act . . . . he shall as from that date be entitled to the substituted right set forth in the second column of that Schedule." When we turn to the Schedule we find among the existing rights in the case of dramatic works specified in the first column, "Performing right" but not copyright," and that is exactly what the plaintiff had. Then the second column says in the plainest terms that a person who had that right shall, from the date that the Act comes into operation, have as a substituted right "the sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act." That seems to me to leave no room for the condition suggested by the defendants.

Then we come to the last defence set up by the first three defendants, which is that, assuming the plaintiff has the right which he claims, nothing that they have done amounts to an infringement of it. What they did was this: they made the film, imported it into this country, and entered into an agreement with the fourth defendant, Mr. Chetham, who is the proprietor of a cinematograph theatre, whereby he was entitled to exhibit it on three specified days, the agreement containing a clause that "The hirer agrees not to purchase posters for the said film from any person . . . . other than the company," and having attached to it an order form for posters. Mr. Chetham gave the company an order for posters for those three days, and the posters were supplied. Upon those materials, treating the question as one of fact, I think there was ample evidence to justify McCardie J. in holding as he did, that the plaintiff's right had been infringed. The definition of "copyright" in s. 1, sub-s. 2, includes "the sole right . . . . to perform . . . . the work" and also "the sole right to authorise any such act." It has been said, and I think the comment is not an unfair one, that the use of that word "authorise" adds nothing to the definition, because, strictly speaking, the sole right of performance must necessarily include the right to authorize performance. But when the definition of "copyright" is read in connection with that of "infringement," I think it becomes fairly apparent that

the object of introducing the word "authorise" was to get rid of the effect of certain decisions, of which *Karno* v. *Pathé Frères* (1) was the most recent, in which it was held upon the language of earlier statutes that a defendant who for reward gave permission to a third person to represent a play in breach of the owner's copyright did not "cause it to be represented," unless the person so representing it was the servant or agent of the defendant. In the present statute that language has been deliberately dropped, and for the word "cause" has been substituted the word "authorise"; and the decision of Tomlin J. in *Evans* v. *Hulton* (2) and the dictum of Buckley L.J. in *Monckton* v. *Pathé Frères* (3) both clearly indicate that in the opinion of those learned judges the present expression is to be understood in its ordinary dictionary sense of "sanction, approve, and countenance." If that is the true view I think McCardie J. was, upon the materials before him, amply justified in coming to the conclusion that the first three defendants had infringed the plaintiff's sole right to authorize the performance of the play. For these reasons I am of opinion that the appeal should be dismissed.

SCRUTTON L.J. I agree with the result at which my Lord has arrived. The facts which give rise to this action are simple. Mr. Gillette, a well known American actor, in 1898 purported to grant to the present plaintiff, Mr. Falcon, the sole right of performance in the United Kingdom of a play called "Held by the Enemy" for the sum of 150*l*. At that time the world did not yet enjoy the blessing of moving pictures. In 1919, after they had come into existence, Mr. Gillette granted to a series of American companies the sole motion picture rights in the play throughout the world for a sum of 4000*l*., and in purported pursuance of that right the American companies made a film from the play, imported a copy into England, and hired out the right to exhibit it to a Mr. Chetham, who is the other defendant. Mr. Chetham

(1) 100 L. T. 260. (2) [1924] W. N. 130
(3) [1914] 1 K. B. 395.

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did exhibit it at a cinematograph theatre at Bedford, whereupon the plaintiff sued the three American companies and Mr. Chetham for infringement of his dramatic copyright. The several defences that were put in to that action arrange themselves under two heads; first, that the plaintiff had not got the performing right that he claimed; and secondly, that, if he had, the first three defendants had not infringed it. Now Mr. Gillette was an American subject, and his play was first produced in 1886, and the defendants' contention was that, even if the place of first production was England, he could not, in view of his nationality, acquire any copyright, because the benefit of the English Copyright Acts is confined to British subjects or to foreigners resident in this country at the time when their literary or dramatic work is first published, and it is conceded that Mr. Gillette was not resident here at the time of its alleged first publication. In support of that contention they rely on the well known decision of the House of Lords in *Jefferys* v. *Boosey* (1), where Bellini, who in 1831 had written an opera called "La Sonnambula," claimed copyright in this country, and the House of Lords held that the benefit of the statute of Anne, under which at that date he alone could claim, was limited in two respects, first, to works first published in the United Kingdom, and secondly, to British subjects or to aliens temporarily resident here at the time of such publication. To that the plaintiff replied that that decision was under the statute of Anne, and that the Act of 1842, which now regulates the matter, owing to the language of its preamble, involves different considerations, and in support of that another decision of the House of Lords was relied on: *Routledge* v. *Low* (2), in which the American author of a book which was first published in England moved from the United States into Canada in order to be resident within the British dominions at the time when the work was so first published. All the members of the House of Lords held that it was sufficient under that statute if the author was resident, not in the United Kingdom, but in the British dominions. But two of the five Law Lords who heard

(1) 4 H. L. C. 815. (2) L. R. 3 H. L. 100.

the case, Lord Cairns and Lord Westbury, were of opinion that it was unnecessary to proceed on so narrow a ground, and that under the Act of 1842, so long as the work was first produced in England, it was immaterial whether the author was temporarily resident in British dominions or not; it was enough that it was first produced in England. Lord Cranworth, who had been a party to *Jefferys* v. *Boosey* (1), and Lord Chelmsford were inclined to the opposite view. Lord Colonsay expressed no opinion upon the point. The question for us is which view are we to adopt? I personally have always taken the view, and propose to take it now, that the view of Lord Cairns and Lord Westbury was right. If that is so, then Mr. Gillette, if his play was first produced in England, would before 1911 have had British copyright in it, notwithstanding that he was resident in the United States at the time of the first production.

The next defence was that there was no proof that the play was in fact first performed in England. The plaintiff alleges that it was so performed on February 20, 1886, and he attempts to prove that in two ways, first, by a certificate of registration, and secondly, by a letter from Mr. Lestocq, who was the agent of Mr. Gillette at the time of the assignment to the plaintiff, both of which state that the play was performed in England on February 20. Sect. 11 of the Act of 1842 provides that certified copies of the entry in the register "shall be prima facie proof of the proprietorship or assignment of copyright . . . . as therein expressed." Now copyright is to last for a certain period of years from the date of first production, consequently to get copyright "as therein expressed" you require to know that date, and in my view the entry of that date in the register is prima facie evidence, subject to be displaced by other evidence. But it is said that the certificate of registration states the author of the play to be William Gillette and William Chapman, and the proprietor of the sole liberty of representation and performance to be William Chapman. If this had been a book that objection would have been fatal, because before you can

(1) 4 H. L. C. 815.

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sue for infringement of copyright in a book you must show a correct registration; but that provision does not apply to dramatic works, and it is not a condition precedent to an action for infringement of performing rights that the play should have been registered at all. Reading the evidence of Mr. Gillette I come to the conclusion that it is not the fact that Mr. Chapman was either part author of the play or the proprietor of the sole liberty of representation. The result is that the certificate of registration is prima facie evidence that the play "Held by the Enemy," written by William Gillette, was first performed on February 20, 1886, at the Ladbroke Hall, Notting Hill, London. Whether the letter written by Mr. Lestocq on September 22 is an admission which can be received in evidence in this case is a question which I do not propose to decide, as I am not sufficiently clear about it. I base my decision as to proof of the plaintiff's title on the registration. That deals with the question of title up to the passing of the Act of 1911.

The defendants then say that even if the plaintiff had the performing right up to 1911, it was taken away from him by the Act of that year. Now s. 24, which deals with copyright in works already existing at the time of the passing of the Act, when read along with the First Schedule, provides that where in the case of a dramatic work a person immediately before the commencement of the Act was entitled to the "performing right but not copyright," he shall be entitled to "the sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act." If that provision stood by itself there could be no question but that the plaintiff would have the sole right to perform this play in public. But it is said that the effect of s. 1, sub-s. 1, is to prevent that result. For that subsection provides that "copyright shall subsist . . . . in every . . . . dramatic . . . . work if (*a*) in the case of a published work"—and in the case of a dramatic work "publication" means, by sub-s. 3, not public performance, but publication as a book—"the work was first published within such parts of His Majesty's dominions," i.e., the parts to which

the Act extends; "and (*b*) in the case of an unpublished work the author was at the date of the making of the work a British subject or resident within such part of His Majesty's dominions as aforesaid; but in no other works." And it is said that if this play was published at all there was no evidence that it was first published in British dominions, or if not published there was no evidence that at the time of writing the play Gillette was resident there. Therefore it is said that s. 24 does not confer any substituted performing right in lieu of the right which the Act took away. But that interpretation makes nonsense of the Act, for it treats it as giving by s. 24 what it has already by s. 1 made impossible to exist. The explanation of s. 1 is that it only attaches conditions to the acquisition of copyright in the future, it has nothing to do with existing rights, for which in the case of the performing rights of a dramatic work there is substituted unconditionally "the sole right to perform the work in public."

We have now got this far, that the plaintiff has established his sole right to the performance of the play in this country. The question then arises: Have the first three defendants infringed it? What they have done is this. They have imported the film into England, and have purported to grant the right to exhibit it to Mr. Chetham—"the company shall grant to the hirer the right to exhibit the film." They have done that for money, the sum of 20*l.*—"which sum the hirer agrees to pay on the first day of exhibition of the said film, and in any event not later than the final day of such exhibition." In my view there is an implied term in that contract that the hirer shall exhibit in order that the sum may become payable to the persons who grant him the right. They have imposed an obligation upon him that he shall perform, and in my view persons who do that perform themselves. I have some difficulty in connection with the words in the definition of copyright—"perform the work" and "authorise any such act." It seems to me the sole right to perform necessarily includes the sole right to authorize performances. The addition of the latter

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words is superfluous and tautological. And in a case such as this, where the owner has granted a right to perform, and imposed a contractual duty on the grantee to do so, in my view the owner himself performs, and it is unnecessary to have recourse to the words "authorise to perform." I see however that difficult questions may presently arise whether the words "authorise to perform" are meant to cover something additional to the case where you perform yourself by granting a right to a man whom you put under a contractual duty to perform. Any one familiar with the old Copyright Acts knows that they were very lengthily worded, and ran "shall make or cause to be made, or sell or cause to be sold, or import or cause to be imported, or represent or cause to be represented," and so on, with a number of other verbs. In the present Act that verbiage has been omitted; the words "cause to," which had had a very restricted meaning put upon them, dropped out, and for them was substituted the word "authorise" with a much wider meaning. Under the old Acts, both in the case of films and of pianola records, the judges had put a construction on the language of the statutes which had the effect of substantially limiting the class of acts which amounted to an infringement of copyright. They had held that a person who supplied a film of a play which was reproduced on the screen did not cause the play to be represented: *Karno* v. *Pathé Frères* (1), and that the person who sold pianola records, from which a musical piece could be played if it was put in a suitable instrument, did not cause the music to be performed: *Boosey* v. *Whight.* (2) In my view the wording of the Act of 1911 was intended to enlarge the protection to authors, and to sweep away those decisions by which their rights had been limited, as against the makers of mechanical instruments by which their works could be reproduced. The decision in *Karno* v. *Pathé Frères* (1) is in my opinion no longer law, and the three American companies in this case are liable for having infringed the plaintiff's performing right, because they "performed" the play themselves. It may be that

(1) 100 L. T. 260. (2) (1900) 1 Ch. 122.

they also authorized the performance by Mr. Chetham, but it is enough that they performed it themselves. For these reasons I agree that the appeal fails.

ATKIN L.J. The plaintiff in this case claims the sole right of performing in this country the dramatic piece entitled "Held by the Enemy," and he claims to possess that right by grant from the author of the piece, Mr. Gillette, who is a citizen of the United States. The defendants have made a film which reproduces that dramatic piece. The first point that the defendants make in answer to a claim for infringement is that Mr. Gillette had no rights in this country which he could grant to the plaintiff at the time when he purported to grant it in 1898, and with the view of establishing that contention they assert as a general proposition that no American citizen could acquire any copyright in this country, either in books or dramatic pieces, unless he was in fact resident in this country when the book was first published or when the dramatic piece was first performed. For that they rely on *Jefferys* v. *Boosey*. (1) But that case was decided under a different Act from the Act which was in force when the plaintiff obtained his grant. In the later case of *Routledge* v. *Low* (2), which was decided under the Act of 1842, two Law Lords, Lord Cairns and Lord Westbury, expressed themselves as of opinion that non-residence of a foreign author in this country at the time of publication was no bar to his acquiring copyright, provided the work was first published or first performed here. I am satisfied that that expression of opinion was correct. But the defendants contended that, even if that was so, there was no proof that this play was first performed in England. It appears to me, in the first place, that, for the reasons that have been stated by my Lord and Scrutton L.J., the certificate of registration of the play affords prima facie proof that the date and place of first performance were the date and place mentioned in that certificate, which would indicate that it was first publicly performed in this country two days before it was first publicly

(1) 4 H. L. C. 815. (2) L. R. 3 H. L. 100.

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performed in the United States. In the second place, it appears to me that the letter of Mr. Lestocq of September 22, 1898, is admissible in evidence of the date of first performance, and for this reason: it was written by a person who was the agent of the author, and bound the author as an admission if it was against his interest at the time that it was written. It was against his interest, and in two respects: it was written as part of the transaction by which the author divested himself of his performing right in this country, and was an admission that he was no longer in the position of being able to assign that performing right to any other purchaser; and further it was an admission that he was no longer entitled to the performing right for the full period of forty-two years, because twelve years of that period had already expired. And if the admission was binding on the author it was equally binding on the defendants, who in fact derived title from him.

The defendants next say that if the plaintiff was entitled to the performing right down to 1911 the Act of that year took it away. It was contended that the new rights which were given to a foreign author in substitution for his existing rights were subject to the provisions of s. 1, sub-s. 1 (*a*), and that where a dramatic work was published—that is to say, published in book form—he ceased to have any performing right if it was first published outside His Majesty's dominions. I cannot accept that contention. It appears to me that s. 24 recognizes and maintains the existing rights of all authors, whether they are British subjects or foreigners, and directs that those rights are to be construed in accordance with the terms of Sch. I.

So much for the title of the plaintiff. There remains the question of infringement. Upon that I agree with the view expressed by my Lord. The plaintiff possessed the sole right to perform the play or to authorize its performances, and by the terms of s. 2 the defendants infringed that right if they either performed the play themselves or authorized its performance by others. To my mind the hiring out of the film for three days on the terms of the contract of hiring,

which is before us, amounts to an authorization by the defendants to Chetham to perform the play, and is an infringement of the right of the plaintiff, who alone has the right to give such an authorization. For the purposes of this case it appears to me that to "authorize" means to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor; and that construction of the word "authorize" seems to have been the one adopted by Buckley L.J. in *Monckton* v. *Pathé Frères* (1), where he held that the seller of a gramophone record authorizes the use of the record, and by Tomlin J., who in *Evans* v. *Hulton* (2) held that a person who sold to a publisher serial rights in stories written by the plaintiff authorized the printing and publication of them. I think the view taken by those two learned judges was right. I agree that the appeal should be dismissed.

Appeal dismissed

Solicitors for the appellants: *Kerly, Sons & Karuth.*
Solicitors for the respondent: *Stanley Hedderwick & Co.*

(1) [1914] 1 K. B. 395, 403. (2) [1924] W. N. 130.

J. F. C.

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June 15.

WILSON *v.* SIMPSON.

Revenue—Income Tax—Deduction or Allowance—Insurance Premiums—Policy on joint Lives of two Persons—Half of Premium paid by each Person—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 32, *sub-s.* 1 (*a*); *sub-s.* 3 (*c*), (*e*) (*ii.*); *Sch E.*

The appellant and his co-director of a company took out a policy of insurance on their lives, which provided that if the annual premium should be duly paid the insurance company should, on the death of either of the two insured, pay the policy moneys to a trustee for them in terms of a deed of trust. By that deed the two insured covenanted that each of them would pay one-half of the premium to the trustee, who agreed to pay the premiums to the insurance company and the policy moneys to the insured as therein directed. The appellant, having paid one-half of an annual premium, claimed to be entitled under the Income Tax Act, 1918, s. 32, sub-s. 1 (*a*), to a deduction of the amount from the profits or gains on which he was liable to income tax:—

Held, that under that provision the appellant had not "made an insurance on his life," and there was no "premium paid by him for any such insurance," and that the deduction could not be allowed.

Case stated by Commissioners for the General Purposes of the Income Tax Acts.

The appellant, Mr. R. Macdonald Wilson, and Mr. William Muirhead, were joint life directors of William Muirhead, Macdonald Wilson & Co., Ld.

By a policy of insurance dated September 20, 1918, which recited that Mr. Muirhead and the appellant were desirous to effect an assurance on the lives of themselves for 10,000*l.* with the Scottish Temperance Life Assurance Co., Ld., it was provided that if there should be paid to the said insurance company in every year during the continuance of the insurance the premium of 602*l.* 1*s.* 8*d.* up to and including September 12, 1947, when the premium should cease, then the insurance company should be liable to pay on the death of either of the persons insured the sum of 10,000*l.* to Mr. W. F. Harwar, the manager of William Muirhead & Co., Ld., as trustee for the insured in terms of a deed of declaration of trust to be thereafter executed.

By a deed of declaration of trust dated September 25, 1918, and made between Mr. Muirhead, the appellant, and

Mr. Harwar, which recited that Mr. Muirhead and the appellant had effected the said policy to secure the said sum of 10,000*l.* upon the death of the first of them, Mr. Harwar was appointed trustee for the insured, their heirs and successors, to recover payment of the policy moneys and to apply them as therein directed to the legatees or representatives of the first deceased of the two persons insured; and Mr. Muirhead and the appellant thereby covenanted and agreed with the trustee that they and each of them would pay to him on September 7 in each year the sum of 301*l.* 0*s.* 10*d.* or such other sum as might be equal in amount to one-half of the premium necessary for maintaining the said policy, and in the event of default by either of the parties insured in payment of his share of the premium the said trustee should have power to sue the defaulting party for the amount, and the trustee agreed out of the sums so received by him to pay the premiums; and it was agreed that on receipt of the policy moneys by the person or persons claiming through the first deceased party, all claims by the estate of that party to participate in the assets or business of William Muirhead & Co., Ld., should abate, and the interest therein of that party should vest in the survivor.

By a further policy of insurance dated May 16, 1919, which was identical in terms with the former policy, except as regards its number and date and the reference to the said trust deed, it was provided that if there should be paid to the same insurance company in every year a premium of the same amount and to cease on the same date as that payable under the former policy, then the insurance company should be liable to pay a sum of the same amount as that for which they were liable under the former policy to the trustee in terms of a further declaration of trust dated May 1, 1919. That policy also was effected pursuant to proposals and declarations therein referred to and subscribed by the insured.

The annual demand for the premiums was made by the insurance office on the two directors and the trustee. The trustee collected the amount of the premiums in equal

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proportions from the two directors, and himself paid the premium to the insurance office on their behalf and received the receipt therefor.

An assessment was made upon the appellant of 1250*l.* for the year 1923–4 under Sch. E of the Income Tax Act, 1918, in respect of his remuneration as a director of the company.

The appellant appealed to the Commissioners against the assessment on the ground that he was entitled to a deduction or allowance under s. 32, sub-s. 1 (*a*), of the Act (1) in respect of the half share of the annual premiums which had been paid by him under the two policies.

It was contended by Mr. Blanco White on behalf of the appellant that he was entitled to the allowance claimed in respect of that half of the premium which had been paid by him; that within the meaning of the Income Tax Act, 1918, s. 32, sub-s. 1 (*a*), the appellant had "made an insurance on his life," having taken out the said policies and assigned them to the trustee, who was merely his nominee; that within the meaning of the last clause of that sub-section the portion

(1) Income Tax Act, 1918, s. 32: "(1.) Any person———— (*a*) who has made an insurance on his life or on the life of his wife, or who has contracted for any deferred annuity on his own life or the life of his wife, with any insurance company legally established in the United Kingdom or in any British possession, or lawfully carrying on business in the United Kingdom, or with a registered friendly society, or, in the case of a deferred annuity, with the National Debt Commissioners, ... shall be entitled to a deduction of the amount of the annual premium paid by him for any such insurance or contract, or of the annual sum paid by him or deducted from his salary or stipend, from any profits or gains in respect of which he is liable to be charged under Schedules D or E.

(3.) No such allowance:— . . . .

(*c*) Shall exceed, in respect of any premium or other payment payable on a policy for securing a capital sum on death (whether in conjunction with any other benefit or not), 7 per cent. of the actual capital sum assured, and, in calculating any such capital sum, no account shall be taken of any sum payable on the happening of any other contingency, or of the value of any premiums agreed to be returned, or of any benefit by way of bonus, or otherwise, which is to be or may be received either before or after death, either by the person paying the premium, or by any other person, and which is not the sum actually assured; . . . .

(*e*) Shall, as regards insurances or contracts for deferred annuities made after the 22nd day of June, 1916; . . . .

(ii.) Be given except in respect of premiums or other payments payable on policies for securing a capital sum on death, whether in conjunction with any other benefit or not; . . . ."

of the premiums paid by the appellant was "the annual premium paid by him," the two insured being jointly liable and hence each of them being liable to the company for the whole premium, but that each of the insured did in fact pay to the trustee half the amount of the premiums, the trustee paying the premiums on behalf of both the insured as their agent; and that within the meaning of sub-s. 3 (*e*) (*ii.*) of that section the policies were, as regarded the appellant, "policies for securing a capital sum on death" in conjunction with other benefits, although they also secured a capital sum on the death of Mr. Muirhead, and that they were precisely similar to "endowment policies," and as such covered by the case of *Gould* v. *Curtis* (1), and that if for the same object each of the two persons had taken out a policy on his own life in the insurance office for 20,000*l.*, with a clause to the effect that on the death of one person the other policy should automatically become void, that would have had the same effect so far as the insured persons were concerned, but no question would have been raised by the Revenue as to the allowance.

It was contended on behalf of the Crown that upon the facts and documents the appellant was not entitled to the allowance claimed in respect of the premiums.

The Commissioners were of opinion that no allowance was due to the appellant under s. 32, and they dismissed the appeal.

Blanco White for the appellant. The appellant is entitled to an allowance or deduction under the Income Tax Act, 1918, s. 32, sub-s. 1 (*a*) (2), in respect of the half share paid by him of the premiums in question.

[Counsel repeated the arguments which he had previously advanced before the Commissioners.]

Sir T. Inskip S.-G. and *R. P. Hills* for the Crown. The appellant is not entitled to the allowance or deduction claimed by him under s. 32, sub-s. 1 (*a*). On the true construction of the policy the appellant has not "made an

(1) (1913) 6 Tax Cas. 293. (2) See note (1) ante, p. 502.

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insurance on his life" within the meaning of that clause, but the appellant and the other party insured have made a joint insurance on their joint lives. This case is distinguishable from the case of *Gould* v. *Curtis* (1), in which there was no contingency except the death of the individual there insured. This appears from the judgment of Hamilton J. in that case, in the course of which he said: "Observations which might be very germane if the policy had combined with that contingency the chance of some other life or lives continuing or some other event or events happening, do not arise in the present case." (2) He there seems to anticipate and distinguish this case. Observations made by Buckley L.J. in the Court of Appeal in that case show that this is not an insurance on the life of the appellant. (3) Further, as regards the appellant, there was no "premium paid by him for any such insurance" within the meaning of the clause. The premium was paid jointly by him and the other party insured. The premium was paid for an insurance on the joint lives with an endowment to the party first deceased. Sub-s. 3 (*e*) (*ii.*) of the section in question provides that no such allowance shall be given except in respect of premiums for securing a capital sum, whether in conjunction with any other benefit or not. The single undivided premium cannot be divided up, for the Act does not admit of that being done. If this case be decided in favour of the appellant many other cases will be brought within s. 32.

Blanco White in reply. The appellant is entitled to an allowance in respect of the premium paid by him, notwithstanding that the policy may be in the nature of an endowment policy. Under sub-s. 3 (*c*), in calculating the capital sum on death for the purpose of assessing the allowance, no account is to be taken of any sum payable on the happening of any other contingency. That clause provides machinery to some extent for disintegrating the premium in such a case as this.

ROWLATT J. The Income Tax Act, 1918, s. 32, sub-s. 1 (*a*), provides that any person who has made an insurance on his

(1) 6 Tax Cas. 293. (2) Ibid. 297. (3) Ibid. 309.

life shall be entitled to a deduction of the amount of the annual premium paid by him for any such insurance from any profits or gains in respect of which he is liable to be charged under Schedules D or E. In this case I think that the provision is not satisfied. The appellant, Mr. Wilson, is not a person who has made an insurance. He has made an insurance jointly with another person. The two of them together have made an insurance, and that is not an insurance made by him. Prima facie a contract made by two persons jointly is not describable as a contract made by one of them only. Again, the insurance is not an insurance on the life of the appellant. It is an insurance on the joint lives of the appellant and another person. Under an insurance such as that the insurance money is payable as soon as either of the insured persons dies. The cesser of the joint lives may occur on the dropping of the life of the other person insured just as it may occur on the dropping of the life of the appellant. The point is that the money becomes payable on the cesser of the co-existence of the two lives. Moreover, the appellant has not paid the premium for any such insurance. He and the other person insured together have paid it. The two of them have paid something more than the premium which either of them would regard as payable for an insurance on his life. The two of them have paid upwards of 600*l.* It appears from the agreement that each of them pays half of that amount. The amount which each pays is not a premium for the insurance. It is the contribution which he has agreed that he will make towards the joint premium for the joint insurance on the joint lives. It is quite a different sum from the premium. It is further said that this case is the same as that in which each of two people has insured his own life separately against the life of the other for a premium of such an amount that the two premiums added together are equal in amount to the premium which the parties paid in respect of this insurance. One could not get into this case the element of similarity to that other case without looking at the agreement, which I do not think one is entitled to look at. Even if the agreement be looked at, however, this case

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is not the same as that other case. In the latter case the position would be that if one of the parties did not pay the premium on his insurance, that insurance would drop and the other would stand, whereas in the present case, unless the full amount of the premium contributed to by both parties is forthcoming, the whole insurance drops. From no point of view can I see that the two transactions are the same.

In my opinion this case is not within the words of the statute, which are the only things I can go by. I think that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *W. H. Bellamy.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

J. R.

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July 22.

COURTAULDS, LIMITED *v.* CITY OF LONDON CORPORATION.

London—Acquisition of Land—Compensation for injurious Affection by Severance—Metropolitan Paving Act, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 82.

Under s. 82 of the Metropolitan Paving Act, 1817, a freeholder, part of whose land has been compulsorily acquired under the Act, is not entitled to recover compensation for injurious affection by severance.

CASE stated by an arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919.

Messrs. Courtaulds (hereinafter called "the claimants") claimed damages in respect of the taking of land in the City of London by the City Corporation (hereinafter called "the respondents") under the Metropolitan Paving Act, 1817, and the Acquisition of Land (Assessment of Compensation) Act, 1919.

In 1912 the respondents by resolution adjudged under the said Act of 1817 that St. Martin's-le-Grand should be widened. Part of the land required for the widening was at that time the property of His Majesty's Post Office, and the resolution

was communicated to the secretary to the Post Office. The respondents did not then proceed to acquire the land or carry out the widening scheme. In February, 1923, Mr. White purchased the freehold of the St. Martin's-le-Grand site with knowledge of the resolution of 1912, and in August, 1923, the claimants, also with knowledge of the proposed scheme of widening, purchased from Mr. White a portion of that site. No plans for building upon the site were prepared by the claimants before the end of December, 1923. On December 14, 1923, the respondents informed the claimants that they had decided to proceed with the widening scheme, and in February, 1924, although such a formality was not strictly necessary under the Act of 1817, they gave the claimants a notice to treat in respect of the land proposed to be taken.

In consequence of the respondents' decision to proceed with the scheme, which involved taking part of the freehold purchased by the claimants, the latter were not able to erect the large building they had contemplated, and they had plans prepared for a smaller building, the expenditure on which would give relatively less productive accommodation than the expediture on the larger building would have given. They accordingly claimed: (1.) 12,072*l.* for the value of the land to be taken, and (2.) 12,000*l.* for damage suffered by them by reason of the set back of their frontage and extra proportionate cost of the smaller building.

The respondents contended that as the claimants were well aware of the prospective widening of the road before they entered into the contract of purchase it should be inferred that the price which they paid to Mr. White was regulated accordingly, and, further, that on the second head of claim the arbitrator was not entitled to award compensation.

The question for the opinion of the Court was whether the claimants were entitled in law to recover compensation under their second head of claim.

Sir Lynden Macassey K.C., *Bruce Thomas* and *H. M. Paul* for the claimants. The question turns upon the construction

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of s. 82 of the Metropolitan Paving Act, 1817. (1) The damage claimed under the second head flows directly from the compulsory acquisition by the respondents of the claimants' land, and therefore the arbitrator is bound to deal with it. The words in s. 82 of the Act of 1817, "or any injury or damage whatsoever," entitle the claimants to compensation for injurious affection by severance.

[AVORY J. I observe that in the 1870 edition of Lloyd's Law of Compensation it is said that there appears to be nothing in s. 82 to warrant such a claim, except in the case of leaseholders and tenants at will.]

The words "or any injury or damage whatsoever that may affect any such person or persons, party or parties, either as leaseholders or tenants at will," cannot have been intended to exclude a freeholder from his right to compensation for the injury he suffers by the severance of his land. The words "either as leaseholders or tenants at will" should be read as "including leaseholders and tenants at will."

Neilson K.C. and *D. C. Bartley* for the respondents. First, even assuming that a claim for injurious affection is within the terms of s. 82 of the Act of 1817, there has been no injurious affection in the circumstances of this case. The

(1) Metropolitan Paving Act, 1817, s. 80, enables the local authority to widen streets, and for that purpose to acquire houses, etc., which they adjudge to project into or otherwise obstruct streets and to pay the owners and occupiers for same.

Sect. 82 contains provisions for impanelling a jury for the purpose of settling disputed compensation, and it enacts that "the said jury . . . . shall inquire of the value of such houses, buildings, lands, tenements or hereditaments, and of the proportionable value of the respective estates and interests of all and every person and persons seised or possessed thereof, or interested therein, or of or in any part or parts thereof, and shall assess and award the sum or sums of money to be paid to such person or persons, party or parties respectively, for the purchase of such houses, buildings, lands, tenements or hereditaments, and of such respective estates and interests therein, and also for goodwill, improvements, or any injury or damage whatsoever that may affect any such person or persons, party or parties, either as leaseholders or tenants at will. . . . ."

By s. 1, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919, it is provided that where by any statute, past or future, land is authorized to be acquired compulsorily by a local authority, any question of disputed compensation shall be determined by one of a panel of official arbitrators.

claimants bought the land with knowledge of and therefore subject to the resolution of 1912, which fixed their relation to the property and prevented them having control over the development and use of the part taken and the part not taken : see per Lord Sumner in *Holditch* v. *Canadian Northern Ontario Ry. Co.* (1)

Secondly, s. 82 does not authorize the giving of damages in such a case as this for injurious affection. The scope of the section is very limited as compared with the Lands Clauses Consolidation Act, 1845. Sects. 49 and 63 of the latter Act make specific provision for compensation for injurious affection, but, except in the case of leaseholders and tenants at will, there is no corresponding provision in the Act of 1817.

Sir Lynden Macassey K.C. replied.

LORD HEWART C.J. In this case, which is stated by an official arbitrator for the opinion of the Court, one question and one question only is submitted—namely, whether in the circumstances set out in the case the claimants are entitled in law to recover compensation for the damage which they allege to have been sustained by them and which they formulate in the case in these words : " A special claim for damage suffered by reason of the set back of the said frontage and extra proportionate cost per cubic foot of the reduced building —viz., 1,255,000 feet at 2.351*d.* or 12,000*l.*" The argument has made it quite plain that whatever rights to compensation the claimants may have are to be found within the limits of s. 82 of the Metropolitan Paving Act, 1817. It is common ground in this case that the provisions of that section have neither been extended nor diminished by subsequent legislation ; and it is an interesting fact that, notwithstanding that the statute in question has been in force for 109 years, no claim such as is now put forward, according to the recollection and records of the City of London authorities, has ever been suggested. In the same connection it is also interesting to observe that fifty-six years ago

(1) [1916] 1 A. C. 536, 543.

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Mr. Eyre Lloyd, in the second edition of his Law of Compensation, published in 1870, said at p. 232, with reference to the Act of 1817: "There does not appear to be any provision under s. 82 for compensation for injury to lands or goodwill except in the case of leaseholders or tenants at will." The section after dealing with the inquiry into the value of the buildings, etc., and the assessment and award of compensation for those taken, provides also for the assessment of compensation "for goodwill, improvements or any injury or damage whatsoever that may affect any such person or persons, party or parties, either as leaseholders or tenants at will." The argument for the claimants really depends upon the proposition that although freeholders are not named they are within the expression "either as leaseholders or tenants at will," which, it is said, should be read as if it were "including leaseholders and tenants at will," and that the words relating to injury or damage, although no contrast is suggested between that which is taken and that which is left, are to be construed as if they were, for example, the same as are to be found in s. 63 of the Lands Clauses Consolidation Act, 1845—namely, "the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith." In the opinion of the Court that contention cannot be sustained, and the answer to the question submitted by the official arbitrator is "No."

The other point mentioned by Mr. Neilson is no doubt a matter well worthy of consideration at the proper time, but in this case it is unnecessary to deal with it.

AVORY and SALTER JJ. concurred.

Solicitors for claimants: *Ashurst, Morris, Crisp & Co.*
Solicitor for respondents: *City Solicitor.*

J. S. H.

THOMAS *v.* TODD.

1926
April 21, 22, 30.

[1925. T. 365.]

Company—Debenture Deed—Appointment of Receiver and Manager—Voluntary Liquidation—Contract—Personal Liability of Receiver.

Where under a debenture deed in the common form made by a limited company the debenture-holder has appointed a receiver to carry on the business of the company, the authority of the receiver so to do is terminated by the voluntary winding up of the company, and on a contract thereafter made by the receiver as such he will be personally liable.

Gosling v. *Gaskell* [1897] A. C. 575 applied.

Action tried by Wright J. without a jury.

The Grafton Galleries Club, Ld. (hereinafter called "the company"), was a company having for its object the provision of dancing and cabaret entertainments at the Grafton Galleries in the county of London, where its registered office was situated.

By a deed poll dated February 19, 1923, and executed by the company, being a debenture deed in the common form, it was provided that the company would repay to the creditor therein mentioned certain sums of money, and it was further provided as follows:—

"3. The company as beneficial owner hereby charges with such payments all its undertaking and all its property present and future including uncalled capital and the charge hereby created shall be a first charge on all the property hereby charged and a floating security, but so that the company is not to create any other mortgage or charge in priority to or pari passu with this debenture.

"10. The creditor may from time to time or at any time after the security hereby created shall have become enforceable as aforesaid appoint any person or persons to be a receiver or receivers of the property hereby charged and may remove any such receiver, and a receiver so appointed shall have power: (1.) To take possession of collect and get in the property charged by this debenture and for that purpose

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to take any proceedings in the name of the company or otherwise as may seem expedient. (2.) To carry on or concur in carrying on the business of the company. (3.) To sell or concur in selling all or any part of the property charged by this debenture after giving to the company at least seven days' notice of his intention to sell, and to carry any such sale into effect by conveying in the name and on behalf of the company or otherwise. (4.) To make any arrangement or compromise which he or they shall think expedient in the interests of the creditor. (5.) To appoint employ and dismiss managers and servants and agents and fix and pay their remuneration. A receiver so appointed shall be deemed to be the agent of the company, and the company shall be solely responsible for his acts or defaults, and for his remuneration. . . . ."

By an indenture dated June 13, 1924, and made between the company and the said creditor, being a debenture deed supplemental to the previous deed, certain alterations were made in the obligations of the company under that deed, but none of these alteratins affected clauses 3 and 10 thereof.

On August 15, 1924, an agreement was made between the company and the plaintiff, Mr. Emlyn Thomas, who was the proprietor and conductor of a band of musicians called " The London Band," consisting of himself and eleven other musicians, that that band should play at the club premises. The terms of the agreement were set forth in a letter of that date from the company to Mr. Thomas which stated that the band should perform daily at the Grafton Galleries Club between the hours of 8.30 P.M. and 2.30 A.M.; that the contract was to commence on September 8, 1924, and to run for a period of three months; that each week of the engagement should commence on a Saturday and end on the following Friday, the salary being payable on the Saturday morning following each Friday; that the plaintiff was to be paid a salary of 180*l.* per week, but that the company was to be entitled to receive 25 per cent. of the gross amount paid to the plaintiff and his band for any music-hall

engagements which they might with the consent of the company accept.

By an appointment in writing dated October 11, 1924, the said creditor appointed the defendant, Mr. James Todd, a member of a firm of accountants, to be a receiver of the property charged by the debenture deeds and so that he should have power to do all the acts and things specified in clause 10 of the deed dated February 19, 1923. The defendant thereupon proceeded to conduct the affairs of the company. He personally or by his partner in business, Mr. Wilcock, interviewed various persons, including among others the plaintiff, who was informed of the defendant's appointment as receiver.

On October 15, 1924, an interview took place between the plaintiff and Mr. Wilcock on behalf of the defendant at which Mr. Wilcock informed the plaintiff that the then current agreement of August 15, 1925, could not go on, and a new agreement was then entered into as to the provisions of which there was at the trial some conflict of evidence between Mr. Wilcock and the plaintiff, but which Wright J. found to have been that the plaintiff should continue with his band on a weekly engagement, that as from that date he was engaged for one week certain, that at the end of any week —namely, on any Friday—if nothing more was said or done, his engagement would automatically cease without notice.

On October 27, 1924, which was a Monday, the company went into voluntary liquidation by passing an extraordinary resolution which stated that by reason of its liabilities it was no longer able to continue its business, and that it should be wound up, and a liquidator was appointed.

On the last mentioned date the band was playing at the club on a week's engagement which had commenced on the previous Saturday, October 25, and it went on playing. On October 31, 1924, the Friday, the secretary of the club telephoned to the plaintiff and said something to the effect that the club was closing on the following day, Saturday, but it was found at the trial that nothing was then said which

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would indicate that the services of the plaintiff and the band were not further required.

On November 1, 1924, the Saturday, the plaintiff attended at the club with the band, which commenced to play, and while the band was playing he went and saw Mr. Wilcock in the office and obtained payment by cheque for the previous week. There was at the trial a considerable conflict of evidence as to what took place at that interview. His Lordship, however, having heard the evidence of the two gentlemen, and while in no way reflecting on the good faith of either of them, found that the agreement then made was not that the band should play for that one night only either without any payment or for payment for that one night only, but that it should play for another week under the then existing agreement; that under the existing agreement the band by playing on that night commenced a fresh week's engagement. Mr. Wilcock stated in evidence that in his view if a contract was made at that interview it was made with the defendant personally.

On November 8, 1924, a petition was presented to the Court for the compulsory winding up of the company, and on November 25, 1924, an order was made thereupon for its compulsory winding up.

On March 3, 1925, the plaintiff, not having been paid for the week November 1 to November 7, 1924, brought the present action against the defendant personally claiming damages for breach of contract. The defendant in his defence stated inter alia that he agreed with the plaintiff only as agent for the company, and that he never agreed personally to employ the plaintiff.

On April 21, 22 and 30, 1926, the action was tried, evidence being given by and on behalf of the parties respectively.

Sir Albion Richardson for the plaintiff.

Porter K.C. and *E. G. Kimber* for the defendant.

[The legal questions raised by counsel and the authorities cited by them are fully set forth in the judgment of the learned judge.]

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WRIGHT J. The plaintiff in this case, Mr. Emlyn Thomas, sues as proprietor of a band called "The London Band," which is employed at various clubs and places of entertainment. It is not denied that he is entitled to sue in that capacity. The defendant, Mr. James Todd, is a member of a firm of accountants, and he is concerned in this matter as the receiver and manager under certain debentures in the common form made in favour of the debenture holder by a limited company called the Grafton Galleries Club, Ld. [His Lordship stated the facts and the findings of fact substantially as above set forth, read the material clauses of the debenture deed dated February 19, 1923, and continued as follows:] I find, therefore, that the plaintiff, while not entitled to a week's notice, is entitled to the week's salary for the week commencing on November 1 and ending on November 7, 1924—namely, a sum of 180*l.*, subject to the abatement provided for in the agreement of August 15, 1924, which I find on the evidence is 39*l.* 5*s.* The result is that I find, subject to the question of law which I am about to discuss, that the plaintiff is entitled to the sum of 140*l.* 15*s.*

In these circumstances it becomes necessary to consider whether the defendant is liable at all in this action, and the inquiry seems to me to involve a question on which I have not been referred to, and have not myself been able to find, any express decision. The agreement which I have found was made on October 15, 1924, between the plaintiff and the defendant, was made by the defendant as agent for the company in the exercise of the power conferred upon him by virtue of his appointment as receiver under the debenture deed. On October 27, 1924, the company went into voluntary liquidation, and that voluntary liquidation is the only liquidation with which I am concerned in this action. It is true that at a somewhat later date—namely, on November 8, 1924, a petition to wind up the company was presented to the Court, and that on November 25, 1924, an order for compulsory winding up was made on that petition. With these latter proceedings, however, I have nothing to do,

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because the dates on which they took place lie outside the period of time which is relevant to the present case.

What happened to the position of the defendant when the company went into voluntary liquidation on October 27, 1924 ?

The first question to be decided is whether the authority of the defendant as receiver and manager to bind the company came to an end by reason of the voluntary liquidation or voluntary winding up. It appears to be quite clear that the authority of the receiver and manager of a company to bind the company is terminated by the compulsory winding up of the company. That was decided, or at least assumed, in the case of *Gosling* v. *Gaskell* (1) by the House of Lords, affirming the dissenting judgment of Rigby L.J. in the Court of Appeal. (2) It certainly seems curious, debentures being common and constantly in the same form as the debentures here in question, that the point now before me has not been decided. The only reference which I have found to it occurs in Buckley on Companies, 10th ed., p. 253, footnote *l*, for which the noble and learned author of that work is responsible, where it is stated that the decision which I have mentioned " does not decide that a voluntary winding up would necessarily have the same consequence." That language may seem to indicate that the same consequence might and perhaps would follow in the case of a voluntary winding up. I think the question must be determined by considering the terms of the debenture deed and the nature of a voluntary liquidation. I have come to the conclusion on consideration of these matters that the right of the receiver to bind the company terminated on the commencement of the voluntary liquidation. I have referred to clause 10, sub-clause 2, of the debenture deed of February, 1923, and I consider the language there used " to carry on or concur in carrying on the business of the company " as having reference to the carrying on of the business of the company as a going concern. Sect. 184 of the Companies (Consolidation) Act, 1908, provides as to a voluntary winding up that the company shall, from the commencement of the

(1) [1897] A. C. 575. (2) [1896] 1 Q. B. 669.

winding up, cease to carry on its business, except so far as may be required for the beneficial winding up of the company. I think that the result of the section is to revoke the receiver's authority to carry on the business of the company, and therefore to bind the company by a contract made by him, because, as I have said, that authority is limited to carrying on the business as a going concern. The result, if this view be correct, is identical with what is expressed by Rigby L.J. in the Court of Appeal in the case of *Gosling* v. *Gaskell* (1) already referred to, as being the ratio decidendi in reference to a compulsory winding up. His language is: "The company was incapacitated by the winding-up order from carrying on business, and the receiver could not create debts which would be proveable in the liquidation against the unmortgaged assets of the company—that is to say, the uncalled capital, if any there were. In other words, he could no longer pledge the credit of the company." (2) Sect. 184 of the Act of 1908, with reference to a voluntary winding up, corresponds with s. 151, sub-s. 1 (*b*), with reference to a winding up by order of the Court, and I do not think that the necessity under the latter sub-section for the sanction of the Court or committee of inspection to enable the liquidator to carry on the business affects the principle which is involved in the matter I am now considering. In a voluntary winding up the liquidator alone can carry on the business of the company, so that he does not need the sanction of the Court to enable him to do so: see s. 186, sub-ss. 3 and 4, of the Act of 1908. I may also refer to the language of Lord Watson in *Gosling* v. *Gaskell* (3), where he said in regard to the compulsory winding up there in question: "The company, when in liquidation, although by no means defunct, could no longer act by its directors, and appoint or employ agents capable of binding the corporation or its estate, and was represented by the liquidator, who could not himself carry on its business without the special leave of the Court." (2) Apart from the words relating to sanction by the Court, I think the position

(1) [1896] 1 Q. B. 669. (2) Ibid. 699, 700.
(3) [1897] A. C. 575, 587.

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would be the same in the case of a voluntary liquidation so far as regards the question which I am now considering. I may add that I have looked at the case of *Midland Counties District Bank* v. *Attwood* (1), and have considered it together with the observations made upon it by Scrutton L.J. in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), *Ld.* (2), but I do not think that it affects the conclusion at which I have arrived. I hold, therefore, that the authority of the defendant to bind the company ceased on the commencement of the voluntary liquidation, that is to say, on October 27, 1924.

I further think that the contract which the defendant made with the plaintiff after the commencement of the voluntary winding up is binding on him personally. I do not base this conclusion on the statement made by Mr. Wilcock in evidence that that was his view if in fact a contract was made. I deal with the matter on the basis of what I consider to be the legal position. I think the position is that a contract was made by the defendant at a time when he had no principal in fact, when he did not purport to be acting for any principal, and when he was not thought by the plaintiff to be acting for any principal. Indeed, so far as the plaintiff was concerned, I am satisfied that he never thought of this question at all. He simply dealt with the defendant as an individual, and on the defendant's representation that he was receiver and manager, without considering any further aspect of the matter. It follows, I think, that the defendant, and the defendant alone, is personally liable. The case of *Gosling* v. *Gaskell* (3), already referred to, throws no light on this point, because in that case the receiver purported in express terms to act for the company when he had no authority to do so. Hence there was there no contract at all, and the only possible liability would have been that of the receiver for damages for breach of warranty of authority. The present case, however, differs from that. The principle applicable to this case is, I think, expressed by Rigby L.J. in *Burt, Boulton & Hayward* v. *Bull* (4), where he used language

(1) [1905] 1 Ch. 357.
(2) [1918] 1 K. B. 592, 606.
(3) [1897] A. C. 575.
(4) [1895] 1 Q. B. 276, 284.

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which I may adopt with a slight variation, both as to application and terminology. The learned Lord Justice there said: "As soon as it appears that he has no principal, and is a receiver appointed by the Court, it is implied, I think, when he enters into a contract, that it is a real contract, by which he binds himself personally." That is an application of the general maxim "Ut res magis valeat." The defendant, in my judgment, did make the contract. There was no one by whom he was authorized, or for whom he purported, to contract other than himself, and I see no reason why any other result should follow than that he should be bound by the contract he made.

I therefore give judgment for the plaintiff for the sum of 140*l.* 15*s.* with costs.

Judgment for plaintiff accordingly.

Solicitors for plaintiff: *Thorp, Saunders & Thorp.*
Solicitors for defendant: *H. S. Wright & Webb.*

J. R.

THE KING *v.* LICENSING JUSTICES FOR THE SPELTHORNE DIVISION OF THE COUNTY OF MIDDLESEX.

Ex parte TURPIN.

1926
May 17.

Licensing—Permitted Hours—Extension—Additional Hour—Certificate—Application for—Discretion of Justices—Extent of—Premises bona fide used for habitually providing Refreshment—Licensing Act, 1921 (11 & 12 *Geo.* 5, *c.* 42), *s.* 3—*Licensing Rules*, 1921, *rr.* 2 (*c*), 6, 9.

On an application by a licensee for a certificate under s. 3 of the Licensing Act, 1921, enabling him to keep the licensed premises open for an additional hour at the end of the permitted hours in the evening on week-days for the supply of intoxicating liquor to persons having meals, the matters as to which the justices are entitled to satisfy themselves are those mentioned in sub-s. 3 of that section—namely, that the premises are structurally adapted for the purpose of habitually providing substantial refreshment to which the sale and supply of intoxicating liquor is ancillary, and that the premises are bona fide used or intended to be used for that purpose. The justices have no jurisdiction to inquire whether the district in which the licensed premises are situated is a busy

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district or a quiet rural district, or whether the grant of a certificate would effect an alteration of the licensed hours, or whether there are other houses in the district whose licensees would be equally entitled to obtain certificates.

ORDER NISI for a mandamus.

The applicant, Mrs. A. E. Turpin, was the tenant of premises known as the Anchor Hotel, Shepperton, Middlesex, and she held a publican's licence in respect of them. The premises were a riverside hotel in immediate proximity to the Thames. They comprised (inter alia) eighteen bedrooms and two dining-rooms, one on the ground floor and one on the first floor, and neither dining-room contained a drinking bar.

On February 4, 1926, the applicant, having given the requisite notices, made an application by her solicitor to the licensing justices of the Spelthorne Division of Middlesex at their general annual licensing meeting for a certificate under the Licensing Act, 1921, s. 3, sub-s. 2 (1), to enable her to keep the premises open for one hour later than the permitted hours in the evening for the purpose of supplying intoxicating liquor to persons having meals.

The following report of the proceedings before the justices appeared in the Middlesex Chronicle of February 13, 1926 :—

" Mr. H. Lloyd Williams for the applicant said no opposition was offered by other licensees or the police, and all it was necessary for him to prove was that the premises were structurally adapted for the purpose and that there would be a bona fide supply of substantial refreshments, to which liquid refreshment would be ancillary.

" The chairman (Mr. J. J. Freeman) said the application opened up a wide question as to precedent for granting such applications in a rural district. If this house was adapted for the purpose so might be one hundred others in the division. He knew of two or three houses in Shepperton alone. It would, he thought, be opening the gate to altering licensed hours. Was it not the intention of the Legislature that

(1) The provisions of the Licensing Act, 1921, and of the Licensing Rules, 1921, so far as relevant are set out below in the judgment of the Lord Chief Justice.

the section should apply to refreshment houses in busy places and not to public houses with good dining rooms in such a district as this? If it was going to be applied to public houses it would be better done at quarter sessions. The difficulty to their minds was whether the Act was intended to give any hotel more.

"Mr. Williams pointed out that only persons having meals would get the benefit of the extra time.

"The chairman said if they granted the application it would mean that about 150 out of 198 houses would be entitled to have an hour more.

"Mr. Williams: They would have to prove that they supplied a substantial number of meals in the evening.

"The chairman: They would probably be able to do that. There was not a single house in the district except Karno's that had the extra hour. Did it not strike applicant that a place like Karno's was intended by the section; did he think that any ordinary hotel was intended?

"Mr. Williams: I think the point is whether sufficient meals are served in the evening to justify a certificate.

"The chairman: In view of the fact that this house is no different to any other house in the district we are not prepared to grant the application.

"Mr. Williams said there was a special provision in the Act for granting certificates.

"The chairman: Yes, or refusing them. You are asking us to take a very grave step. We do not think that these premises are any more suitable than any of the other 150 houses in the district. Your arguments go to letting all these 150 houses have an extra hour, which is making nonsense of the Licensing Act.

"Mr. Turpin gave evidence as to there being a considerable demand for meals late in the evening, particularly in the summer, and said it was a very unpleasant duty to have to take drinks away from the diners. They got such facilities at other riverside hotels outside the division, and did not know that a licensee had to apply to the Court before he could get permission. In the winter one dining-room was in

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use and in the summer two, accommodating about a hundred people.

"The chairman pointed out that in the summer the closing hour was 10.30 P.M. The diners were allowed an extra half an hour to consume their drinks. Was not 11 o'clock late enough in a rural district?

"Mr. Turpin: Very often they don't come in to dinner until 10.30 P.M., and he had often had people in at 12 o'clock.

"The chairman said the bench were against granting the application, as the necessity had not been proved."

The applicant thereupon made an application for an order nisi to the justices to show cause why a writ of mandamus should not issue to them to hold an adjournment of the said general annual licensing meeting, and at such adjournment to proceed to hear and determine the matter of the said application upon the ground that they took into consideration matters outside their jurisdiction. The application was supported by an affidavit of the applicant, in which she stated (inter alia) that the above report of the proceedings before the justices was an accurate account of what took place, and by an affidavit of a press reporter, who stated that the said report was an accurate reproduction of a shorthand note which he had taken of the proceedings.

On March 31, 1926, the Court made the order nisi, upon notice thereof to be given to the justices and the superintendent of police.

On April 9, 1926, an affidavit was made by the chairman of the said licensing justices who presided at the said meeting, which, so far as material, was as follows: "Before hearing the application, I with two other justices inspected two rooms at the Anchor Hotel which were used or intended to be used as dining rooms, and each of them was in our opinion structurally adapted for the purpose. The said Anchor Hotel is in the rural village of Shepperton and is close to the river Thames. Having agreed that the dining rooms were structurally adapted the only question considered by the justices was whether there was or was likely to be a bona fide demand for meals requiring liquor to be served after 10.30 P.M.

The husband of the licensee gave evidence that parties in motors arrived at all hours, adding that in one case it was 2 o'clock in the morning. The justices decided that there was no such demand as would justify the issue of a certificate. It is of importance to the justices in this division to know whether they have a discretion beyond determining whether the licensed premises are structurally adapted, because the number of hotels adjoining the river is large, and they all have dining rooms. In Shepperton alone there are four hotels besides the Anchor which have dining rooms structurally adapted."

No counsel appeared for the justices to show cause.

Whiteley K.C. and *Roland Burrows* in support of the order nisi.

LORD HEWART C.J. This is an order nisi calling upon the licensing justices for the Spelthorne Division to show cause why a writ of mandamus should not issue to them to hold an adjournment of the general annual licensing meeting held on February 4, 1926, and at that adjournment to hear and determine an application by the applicant, upon the ground that the justices took into consideration matters outside their jurisdiction. It appears from the affidavits that at that annual licensing meeting the applicant, Mrs. Turpin, who is the licensee of the Anchor Hotel, Shepperton, made an application for a certificate under s. 3 of the Licensing Act, 1921, entitling her to keep the premises open for an additional hour in the evening. Two accounts are given in the affidavits of the proceedings at the meeting. These accounts do not contradict each other, but it may be thought that they supplement each other. The affidavits filed on behalf of the applicant verify a report of the proceedings, which has not been challenged in any point. According to that report, as soon as the representative of the applicant had stated what it was necessary for him to prove, the chairman said that the application opened up a wide question as to the granting of such applications in a rural district, and that if

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the house in question was adapted for the purpose mentioned in the section so might be a hundred others in the division. He added that he thought that to grant the application would be opening the gate to altering licensed hours, and asked if it was not the intention of the Legislature that the section should apply to houses in busy places and not in such a district as that in question. A little later he said that in view of the fact that the house was not different from any other house in the district, the justices were not prepared to grant the application. Again, he said that the justices did not think that the premises were any more suitable for the purpose mentioned than any of the other houses in the district, and that the arguments on behalf of the applicant went to letting all these 150 houses have an extra hour, which would be making nonsense of the Act. If that report is correct, and its correctness has not been questioned, all these observations were made before any evidence had been given. Mr. Turpin, the husband of the applicant, then gave evidence to the effect that at the premises in question there was a considerable demand for meals late in the evening, particularly in summer, that it was unpleasant to have to take drinks away from the diners, who got such facilities at other hotels, and did not know that a licensee had to apply to the Court for the additional hour, and that in winter one dining room was in use and in summer there were two accommodating about a hundred people. He was thus speaking of an existing refreshment trade and demand for meals. The chairman thereupon reverted to the topic of a rural district, asking whether the ordinary closing hour was not late enough in a district of that kind. He then said that the bench were against granting the application, as the necessity had not been proved. That is one account of the proceedings. The other account is given in an affidavit by the chairman of the justices, in which he says that before hearing the application he with two other justices inspected two dining rooms at the hotel, and that they were in their opinion structurally adapted for the purpose, that thereupon the only question considered by the justices was whether there was, or was likely to be, a bona

fide demand for meals requiring liquor after 10.30 P.M., that the husband of the appellant gave evidence that parties arrived at all hours, and that the justices decided that there was no such demand as would justify a certificate. The chairman then adds that it is of importance to the justices in the division to know whether they have a discretion beyond determining whether the licensed premises are structurally adapted because the number of hotels adjoining the river is large and they all have dining rooms.

The question whether or not the justices took into account matters outside their jurisdiction turns on the relevant provisions of the Licensing Act, 1921, and of the Licensing Rules, 1921. Sect. 3, sub-s. 1, of the Act provides that: "The provisions of this Act as to permitted hours on week-days shall, as respects licensed premises or clubs to which this section applies, have effect, if the holder of the licence or the committee of the club so elects, as though one hour were added at the end of the permitted hours in the evening"; and to that sub-section there is a proviso in the following terms: "Provided that any intoxicating liquor sold or supplied during that hour shall be sold or supplied only for consumption at a meal supplied at the same time in such portion of the premises as is usually set apart for the service of meals, and no person shall consume or be permitted to consume any intoxicating liquor on the premises during that hour except at such meal, and any drinking bar in the said premises shall be closed during that hour." Sub-s. 2 provides that: "This section applies to any licensed premises or clubs if and so long as the licensing justices are satisfied that they are structurally adapted and bona fide used or intended to be used for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment, to which the sale and supply of intoxicating liquor is ancillary." Sub-s. 3 provides that the licensee shall give certain notices, and s. 12 provides that the powers of the justices under the Act may be exercised by them in accordance with rules made by the Secretary of State.

The words of s. 3, sub-s. 2, require that the licensing

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justices before granting a certificate under the section are to be satisfied of two facts—namely, first, that the premises are structurally adapted for the purpose specified in the section, and, secondly, that they are bona fide used or intended to be used for that purpose. Here no question arises as to the first of these matters, for it is common ground that the premises are structurally adapted for the purpose mentioned. The question arises only in regard to the second of these matters. That includes two alternative cases. The justices are to be satisfied that the premises are bona fide used or intended to be used for the purpose mentioned. The purpose is that of "habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment, to which the sale and supply of intoxicating liquor is ancillary." The emphasis there is on the words "habitually" and "substantial." The refreshment provided must not be a mere cloak for the supply of the intoxicating liquor, but must be substantial refreshment, to which the supply of the liquor is merely ancillary. Turning next to the Rules of 1921, one finds that r. 6 contains this paragraph: "The justices shall satisfy themselves in such manner as they think fit as to whether the arrangement of the premises and the nature of the business there carried on are such as to justify the grant of a certificate, having regard to the provisions of the said section 3." It is not difficult to imagine that in a case in which the applicant does not as yet use but only intends at some future time to use the premises for the purpose mentioned, the construction of the words "the nature of the business there carried on" might give rise to difficulty. In this case, however, that difficulty does not arise, because it appears that an actual business of the kind in question was being carried on and that it is desired to continue that business.

In these circumstances the justices, being satisfied that the premises were structurally adapted for the purpose, had only to inquire whether they were bona fide used for the purpose of habitually providing substantial refreshment to which the sale and supply of intoxicating liquor was ancillary.

To that inquiry it is not strictly relevant to consider whether the licensed house is situated in a rural district. Nor is it relevant to consider whether the grant of a certificate would effect an alteration of the licensed hours, which indeed it is the function of this section to effect. Nor is it relevant to consider whether, if this be a licensed house which complies with the statutory conditions, there may not be other houses in the district which also comply with these conditions.

The duty of the justices is to satisfy themselves that the premises are structually adapted and bona fide used or intended to be used for the purpose mentioned. It is to be observed that where the premises are intended to be used for a restaurant business in the future the justices have to satisfy themselves as to the bona fides of the applicant's intention so to use them; but where, as here, the premises are already used for a business of that kind which the applicant desires to develop or cultivate, it is not necessary for the justices to satisfy themselves as to the bona fides of an intention, but only as to the bona fides of the actual user. Here the applicant shows that the premises are being actually used for a restaurant business.

In my opinion this order nisi should be made absolute for a mandamus to the justices to hear and determine the application.

SALTER J. I am of the same opinion. It seems to me that the justices in dealing with this case have had regard, and indeed exclusive regard, to a consideration which has no application to proceedings under s. 3 of the Licensing Act, 1921. Under some sections of the Act regard may, no doubt, be had to the public requirements of the district, as for example under s 1, sub-s. 1 (*b*). It is clear, however, that s. 3 is not one of these sections. That section is intended to encourage the carrying on of restaurant trade in licensed houses. It is framed on the assumption that a licensed house which supplies food is preferable to one which supplies only intoxicating liquor, and it provides, as respects licensed premises to which it applies, that the Act is to have effect

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Salter J.

as though one hour were added at the end of the permitted hours in the evening for supplying intoxicating liquor with meals, provided the meals are genuine meals. Under sub-s. 2 of that section, in order that the section may apply to the premises, the justices must be satisfied of two matters, the structural adaptation of the premises, and their user for the provision of meals. As to the first of these matters no question here arises, the justices being satisfied as to the structural adaptation of the premises. As to the other matter, the sub-section deals with two classes of case—namely, that in which the premises are used for the purpose of a restaurant business, and that in which they are intended to be so used. The present case belongs to the first of these classes. I say nothing about the other and perhaps more difficult case in which the application is made by a licensee who intends to begin the carrying on of a restaurant business. In the present case the question for the justices was whether the premises are "bona fide used . . . . for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment, to which the sale and supply of intoxicating liquor is ancillary." The word "habitually" as there used means, not necessarily continuously, but regularly, and to persons frequenting the premises. The important words seem to me to be "substantial" and "ancillary," in view of the fact that attempts are sometimes made to sell intoxicants under a colourable sale of food. The intention is that the justices shall be satisfied that the restaurant business is a genuine business in which food is the main item and intoxicating liquor only ancillary. Rule 6 of the Rules of 1921 might perhaps require special consideration in a case in which the applicant did not as yet use but only intended to use the premises as a restaurant, but it gives rise to no difficulty here. In its application to a case like the present it would seem to mean little, if anything, more than that the justices must be satisfied that as regards the particular premises the statutory provisions are complied with. If the justices are satisfied on that point it is not necessary for them to consider whether the district in which

the premises are situated is busy or quiet, or whether the grant of the certificate may have the effect of inducing the licensees of other houses of a similar kind in the district to apply for certificates. I agree that the order nisi should be made absolute.

FINLAY J. I am of the same opinion. The only matters which the justices have to consider under s. 3, sub-s. 2, are whether the premises are structurally adapted and bona fide used or intended to be used for the purpose mentioned in the sub-section. As to the structural adaptability of the premises for that purpose no question here arises, because the justices have satisfied themselves that these premises are structurally adapted. As to the other matter, the premises may be either used or intended to be used for the purpose mentioned. In some future case where the premises are not already used, but only intended to be used, for supplying meals there may be difficulty in deciding whether the justices should grant a certificate, in view more especially of the provisions of r. 6, but that question does not arise here. In this case the premises are used for providing meals, and the only question is whether they are used in the manner specified in s. 3, sub-s. 2. I agree with all that has been said by the Lord Chief Justice and my brother Salter as to the construction of the words of the sub-section. It is reasonably clear that the justices did not confine themselves to the consideration of the matters there mentioned. Indeed it would seem that these matters did not form the main subject of their consideration. I agree that this order nisi should be made absolute.

Order absolute.

Solicitors for applicant: *Maitland, Peckham & Co.*

J. R.

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[IN THE COURT OF APPEAL.]

RICHMOND *v.* SAVILL.

Landlord and Tenant—Surrender of Lease by Tenant—Effect of—Accrued Breaches of Covenant—Release by Lessor in general Terms—Construction of.

A surrender of a lease by a tenant operates only to release him from liability on the covenants taking effect after the date of the surrender, leaving him liable for past breaches; and this is so even though the surrender was made by agreement with the landlord.

A tenant negotiated with his landlord for a surrender of his lease on terms which had no connection with a discharge of the tenant from liability for past breaches of covenant, and in the result the landlord agreed that, if the tenant would pay the rent up to a certain future date and would give up possession, he would "release him," without saying from what:—

Held, that the release, though in general terms, must be read as limited to the matters which were in the contemplation of the parties at the time when the release was given, and consequently did not release the tenant from liability for past breaches of the covenant to repair.

APPEAL from a judgment of Finlay J.

By a lease dated December 12, 1923, the plaintiff let to Lady Humphery, who had for some years been tenant of the premises, a house known as "The Grove" at St. Leonards-on-Sea for a term of twenty-one years from Michaelmas, 1922. The lease contained covenants to repair and to pay to the lessor at the expiration or sooner determination of the term the sum of 300*l.* in satisfaction of all claims for dilapidation. It also contained provisions for its sooner determination, but in the events which happened it was not determinable before September 29, 1925. Lady Humphery died on November 2, 1924. Immediately upon her death the defendant, as her executor, entered into negotiations with the plaintiff's representative for a licence to sublet the house furnished for a period of not less than six months, or in the alternative for a surrender of the lease at once. The plaintiff was unwilling to grant the licence to sublet, but on November 15, 1924, his representative wrote the following letter to the plaintiff's solicitor: "If Lady Humphery's executor agrees to pay the rent of 'The Grove' up to March 25,

1925, and gives up possession not later than the end of February next, my brother is willing to release him." That letter was communicated to the defendant, who accepted it orally, and thereupon gave up possession. The plaintiff brought this action claiming damages for breaches of the covenants to repair which had accrued before the date of the surrender. The defendant contended that the effect of the surrender was to discharge the tenant from all liability under the lease, whether for past breaches of covenant or future, and further that there was in the letter of November 15 an express release which, being in general terms, released the defendant from liability for the damages claimed. Finlay J. did not deal with the question of the express release, but held that the effect of the surrender by itself was to extinguish the defendant's liability for all breaches past or future, and gave judgment for the defendant.

The plaintiff appealed.

Neilson K.C. and *Hildesley* for the appellant. The judge below was wrong in holding that the surrender discharged the defendant from liability for past breaches. In *Attorney-General* v. *Cox* (1) it was held by the House of Lords that where a lease, containing a covenant for the payment of rent, is surrendered, the personal covenant is independent of the estate in the property, and as to rent previously due is not affected by the surrender. What is true of the covenant to pay rent must be equally true of the covenant to repair. In *Hartshorne* v. *Watson* (2) an action of covenant for rent reserved by a lease accruing due before re-entry for a forfeiture was held to lie notwithstanding that the lessor on re-entry was to have the premises "as if the indenture had never been made." Tindal C.J. said: "The proper construction of this condition is that *from the time of re-entry* the lessor shall have the land as if the indenture had not been made; for the period previous to re-entry the lessee or assignee had it subject to the indenture. It would be a singular construction to hold that to an action for rent

(1) (1850) 3 H. L. C. 240. (2) (1838) 4 Bing. N. C. 178, 182.

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on an instrument under seal, the lessee or assignee may plead, not payment, but that the lessor entered for non-payment; in other words, may deprive the lessor of his rent, because he declines to submit to any further loss: the argument would apply equally to a covenant for repairs, or other services to be rendered by the lessee, and is so unreasonable that it cannot be upheld." That was followed in *Blore* v. *Giulini*. (1) There lessees under a lease for fourteen years had power to determine it at the end of the first seven by giving a six months' notice, and "in such case this present indenture and every clause matter and thing herein contained shall upon the expiration of the said notice cease and determine and be void," and it was held that on determination of the lease by the lessees under that power the lessor was entitled to sue for existing breaches of the covenant to repair, notwithstanding that his right to do so was not expressly reserved. Wright J. said: "As a matter of common sense it is impossible to suppose that it was ever intended by the parties that the liability of the lessees to pay damages for the breaches of covenant already committed by them should be put an end to by mere determination of the lease." In *Gray* v. *Owen* (2) the plaintiff let a house to the defendant on the terms that in a certain event the tenant might give a quarter's notice to quit. The defendant, in the mistaken belief that that event had happened, gave the notice, and the plaintiff accepted it and resumed possession. Six months later the plaintiff, having discovered the mistake, sued for the rent which had accrued in the interval. It was held that he was precluded by the surrender from recovering the rent as such, but that he was entitled to recover it as damages for breach of an implied undertaking not to give notice except in the event stipulated, and to the recovery of those damages the surrender was no impediment. Bucknill J. said: "The acceptance of the surrender does not preclude the plaintiff from suing for damages for the breach by the defendant of the contract. It did not destroy the existing cause of action." The question was also raised in this Court in a comparatively

(1) [1903] 1 K. B. 356. (2) [1910] 1 K. B. 622.

recent case: *Dalton* v. *Pickard*. (1) There a tenant of an agricultural holding surrendered his holding to his landlord on terms which were reduced to writing, and which were silent on the subject of the landlord's claim for dilapidations or of the tenant's discharge from his liability for them. The Court held that the surrender did not prevent the landlord from claiming in respect of them in an arbitration under the Agricultural Holdings Act, 1908. Fletcher Moulton L.J. said: "A question has been raised as to what are the rights of a landlord who has accepted from his lessee a surrender of the lease before the term is expired. To my mind it is clear beyond dispute that by accepting that surrender and terminating the continuance of the lease he does not in any way waive or get rid of accrued rights of action in respect of breaches of the covenants of the lease during the time that the lease existed. His lessee entered into those covenants and was bound to keep them, and if he broke them there were vested causes of action, and there is nothing in the legal operation of the surrender which takes away from the reversioner any of those vested causes of action." And Farwell L.J. said: "The law has been settled for centuries that the mere acceptance of a surrender does not affect the rights of action under the lease accrued before that surrender." It is true that in *Ex parte Allen; In re Fussell* (2), which is the authority on which Finlay J. in the present case mainly relied, Cotton L.J. is reported to have said that the "surrender of a lease involves this, that there shall be a giving back to the lessor of the entirety of the property which is comprised in the lease, with a corresponding release of the tenant from the covenants contained in the lease"; but that dictum must be read with reference to the facts before the Court. There a lessee of land and chattels at one entire rent became bankrupt, and the trustee disclaimed the lease under s. 23 of the Bankruptcy Act, 1869, which provided that on such disclaimer the lease "shall be deemed to have been surrendered as from the date of the order of adjudication."

(1) Unreported. See note at end of this case.
(2) (1882), 20 Ch. D. 341, 348.

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The trustee, notwithstanding that surrender, claimed to retain the chattels on the ground that they vested in him, under s. 15, as from the earlier date of the act of bankruptcy. The Court held that he could not do so, but that as the land and chattels were held under the same lease he could not surrender the one without also surrendering the other. But Cotton L.J.'s mind was not there directed to the fact that the trustee's title to the land and chattels was acquired at different dates; he did not mean that the surrender had a retroactive effect so as to divest the title to the chattels which had already accrued, but for the purpose of the case before him treated the trustee's title to the whole of the subjects of the lease as having been simultaneously acquired. The same observation is to be made with reference to a dictum of Lush L.J. in *Ex parte Glegg*. (1) There a lease contained a proviso that the lessee might during the term or within twelve months after the expiration or sooner determination thereof remove any machinery that he had erected on the premises. The lessee became bankrupt. The trustee sold the fixtures and afterwards disclaimed the lease. The Court of Appeal held that the disclaimer having by s. 23 the operation of a surrender, upon that disclaimer the proviso was put an end to with all the other provisions of the lease, and that the trustee was not entitled to the proceeds of the sale as against the lessor. But that meant nothing more than that the trustee must surrender all or nothing. The dictum of Lush L.J. that "when the disclaimer is executed there is an entire end of the relation of lessor and lessee as if it had never existed" is a loose statement which was entirely unnecessary to the decision. And that this is the true view of those dicta seems clear from the language of Jessel M.R. in *Ex parte Hart Dyke*. (2) He had been a party to the decisions in both the last mentioned cases, and he said: "What is the effect of a disclaimer? This has been decided by the Court of Appeal twice, in *Ex parte Glegg* (1) and *Ex parte Allen* (3). It puts an end to the lease, not merely to the term but to the lease itself. On the one hand, therefore, it deprives the

(1) (1881) 19 Ch. D. 7, 17. (2) (1882) 22 Ch. D. 410, 425. (3) 20 Ch.D. 341.

landlord of the future benefit of all those clauses of the lease which give him a benefit; and on the other it deprives the tenant of the future benefit of all those clauses which give him a benefit." He added that the appellant "says that the tenant has committed some breaches of covenant. Well, if he has, the appellant can prove for damages in respect of them." But it may be that the question here is not so much the effect of a surrender as the meaning of the letter of November 15, "is willing to release him." From what did the landlord intend to release him? In *London and South Western Ry. Co.* v. *Blackmore* (1) Lord Westbury said: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release." Here the parties had not in their contemplation the past breaches of the covenant to repair. The provision in the lease that the tenant should at the expiration or sooner determination of the term pay to the lessor 300*l.* in satisfaction of all claims for dilapidation was only intended as a quantification of the damages. It was not a stipulation which was only to take effect after the expiry of the lease and was therefore put an end to by the surrender. But even if it was the lessor can recover damages, which are at large and will probably much exceed 300*l.* But he does not ask for more than 300*l.*

Hawke K.C. and *F. E. Farrer* for the respondent. It was unnecessary for the judge in this case to consider the effect of a surrender, for there was here an express release. The landlord agrees that if the tenant will give up possession he will "release him." That must mean from all the tenant's obligations. There is no reason why, in the absence of some qualifying words leading to such a conclusion, the letter should be read as limiting the release to a release from future obligations. There is nothing indicating an intention to cut down the generality of the release. But even if there is not

(1) (1870) L. R. 4 H. L. 610, 623.

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an express release from liability for past breaches, the effect of the surrender is to discharge the tenant from that liability. A distinction is to be drawn between cases in which the lease is determined by the act of one of the parties against the will of the other and cases in which it is determined by mutual agreement. It is not disputed that if a tenant, being empowered by the terms of his lease to put an end to it, does so, as in *Blore* v. *Giulini* (1), he cannot rely on the determination as relieving him from liability for damages for past breaches of covenant. Equally, in the converse case, where the landlord determines the lease by re-entry for breach of covenant, as in *Hartshorne* v. *Watson* (2), it would admittedly be impossible to contend that the tenant should be thereby discharged from liability for those breaches. But where the surrender is made under an agreement in that behalf it is otherwise. In the Old Natura Brevium (3) appears this passage: "It is said that in case that tenant for term of life make waste and surrender his estate to him in reversion, and he doth accept it and manure the land after, he shall never have an action of waste, for that he was never constrained by the law to receive or take the land." And here the landlord was not constrained by the law to receive the premises. If *Dalton* v. *Pickard* (4) is to be regarded as an authority for the proposition for which it has been cited, it is remarkable that it was never reported. The probable explanation is that the decision there turned on the particular language of the contract stipulating for a valuation.

BANKES L.J. This is an appeal from a judgment of Finlay J. The action is by a landlord against the executor of a deceased tenant to recover damages for breach of a covenant to repair. The lease in respect of which the claim arises was dated December 12, 1923. It was for a term of twenty-one years from Michaelmas, 1922, at a rent of 230*l.*, and contained onerous covenants to repair. There was provision in the lease for its determination in certain events

(1) [1903] 1 K. B. 356.
(2) 4 Bing. N. C. 178.
(3) Fol. 41 of the 1557 ed.
(4) See note at end of this case.

after September 29, 1925, but it was not determinable before that date. The tenant died on November 2, 1924, and her executor immediately got into negotiation with the landlord's representative, with the object of obtaining permission, if possible, to sublet the house furnished for a period of six months, or in the alternative of surrendering the lease. The landlord did not approve of the subletting, but intimated that he would be quite willing to take a surrender of the lease at the very shortest notice, and in the result the letter of November 15 was written, upon which, in my opinion, everything turns. That letter, which was written by the landlord's brother, and had reference to the negotiations above mentioned, was in these terms: "If Lady Humphery's executor agrees to pay the rent of 'The Grove' up to March 25, 1925, and gives up possession not later than the end of February next, my brother is willing to release him." That offer was accepted, and the defendant gave up possession of the premises, but subsequently a dispute arose as to what the letter meant, and what were the rights of the landlord under it. In the result this action was brought, the landlord claiming 300*l.*, which he alleged to be the quantified amount of the dilapidations as provided for by the lease, and also damages. By an agreement in writing on December 15, 1925, the solicitors to the parties agreed what the points were that the judge should be asked to decide, and among those points was this: "Did the surrender of the 1923 lease relieve the defendant of his liabilities under all or any of the covenants?" In his answer to that question the learned judge, founding himself upon a passage in a judgment of Cotton L.J. in *Ex parte Allen; In re Fussell* (1), where he said: "In my opinion a surrender of a lease involves this, that there shall be a giving back to the lessor of the entirety of the property which is comprised in the lease, with a corresponding release of the tenant from the covenants contained in the lease," held that the surrender operated to extinguish all the obligations of the parties, past as well as future, and relieved the tenant from all liability for breaches of the

(1) 20 Ch. D. 341, 348.

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Bankes L.J.

covenants in the lease in respect of which rights of action had already accrued. But it appears to me that when Cotton L.J. used the language that he did he had not present to his mind the distinction between future breaches and breaches that had already accrued, and that if he had he would have limited the generality of his proposition, as Sir George Jessel did in the later case of *Ex parte Hart Dyke*. (1) There the Master of the Rolls, speaking of a disclaimer of a lease by a trustee in bankruptcy, which by s. 23 of the Act of 1869 was treated as equivalent to a surrender, said: "It puts an end to the lease, not merely to the term, but to the lease itself. On the one hand, therefore, it deprives the landlord of the future benefit of all those clauses of the lease which give him a benefit; and, on the other hand, it deprives the tenant of the future benefit of all those clauses of the lease which give him a benefit. The result, therefore, is that in the present case neither party can claim the benefit of those provisions of the lease which arise only at the end or other sooner determination of the lease." He there clearly pointed out that in his view the effect of the surrender is to operate upon obligations under the lease which are unperformed and unperformable because the lease is determined. In reference to this distinction between past and future breaches I should like to refer to two of the cases which have been mentioned. One is *Hartshorne* v. *Watson* (2), where it was contended that, because a lease provided that in the event of re-entry for forfeiture the lessor should have the land "as if the indenture had never been made," the lessor was precluded by such re-entry from suing for rent accrued due before the forfeiture. And that contention was regarded as so unreasonable that the Court refused to uphold it. In *Attorney-General* v. *Cox* (3) a similar contention was rejected by the House of Lords. Lord Cottenham emphatically stated that a surrender did not operate to extinguish a claim for rent which had already accrued. "The personal covenant is independent of the estate in the property mortgaged, and is not affected

(1) 22 Ch. D. 410, 425. (2) 4 Bing. N. C. 178.
(3) 3 H. L. C. 240, 275.

by its surrender or other determination." It is quite true that in that case the personal covenant there referred to was a covenant to pay rent, but I cannot see that any distinction can be drawn between a covenant to pay rent and a covenant to repair; they are equally within the language of the judgment, personal covenants independent of the estate. And in an unreported case of *Dalton* v. *Pickard* (1) the view of the law which was indicated in the case I have just referred to was expressly applied to breaches of covenant to repair. There the tenant, who held for a term of years, was requested to surrender his tenancy. He agreed to do so upon terms in which no mention was made of any claim by the landlord for dilapidations, and he contended that under those circumstances the effect of the surrender was to preclude the landlord from making any such claim. But the Court of Appeal held otherwise. Fletcher Moulton L.J. said: "A question has been raised as to what are the rights of a landlord who has accepted from his lessee a surrender of the lease before the term is expired. To my mind it is clear beyond dispute that by accepting that surrender, and terminating the continuance of the lease, he does not in any way waive or get rid of accrued rights of action in respect of breaches of the covenants of the lease during the time that the lease existed. His lessee entered into those covenants and was bound to keep them, and if he broke them there were vested causes of action, and there is nothing on the legal operation of the surrender which takes away from the reversioner any of those vested causes of action." And Farwell L.J. said: "The law has been settled for centuries that the mere acceptance of a surrender does not affect the rights of action under the lease accrued before that surrender." I may add that I am quite unable to appreciate the distinction that has been suggested between a surrender that has been made by the tenant as of right, and a surrender made by the tenant at the request of the landlord.

If therefore the case depended upon the point alone upon which the judge in the Court below decided it I think

(1) See note at end of this case.

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the plaintiff would be entitled to succeed. But I do not think it does depend upon that, for I quite agree that there is something here more than a surrender, and everything in my opinion depends upon the true construction of that something more, which is contained in the letter of November 15. That letter uses the word "release," and that is a word of extremely wide application, but it is one in reference to which attention has frequently been called in decisions to the necessity of ascertaining what the parties were contracting about before the Court can determine the true meaning of the word "release" as used in the agreement to be construed. Thus Lord Westbury in the case which was cited to us, *London and South Western Ry. Co.* v. *Blackmore* (1), said: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release." Now what was in the contemplation of the parties in the present case was clearly not any question of dilapidations or the obligation to pay damages for breaches of covenant. What they were bargaining about was the counter offer of the landlord to accept the surrender and the terms upon which the tenant should be allowed to depart, and in my opinion the letter refers to that and to that only. The obligation from which the lessor expresses his willingness to release the defendant is the obligation to remain on as tenant up to Michaelmas, 1925, and has no reference whatever to any liability for breaches of covenant accrued before the date of the surrender.

There is only one other matter to which I wish to refer, and that is the peculiar terms of the lease in reference to dilapidations to the house and the amount payable in respect of those dilapidations on the termination of the lease. I have felt some doubt as to the true meaning of that clause, but as I understand that the parties are willing to treat the last part of it as a quantification of the damages in the event

(1) L. R. 4 H. L. 610, 623.

of a breach, and not to regard it as a liability arising only upon the determination of the lease, my difficulty on that point is removed; and as the defendant is not released by the surrender from his liability to pay damages for the accrued breaches of the covenant to repair, the amount of those damages is agreed at 300*l*. The result is that the appeal will be allowed and the judgment set aside, and entered for the plaintiff for the agreed amount of damages.

ATKIN L.J. This action is brought against the executor of Lady Humphery, who was the tenant of the plaintiff under a lease granted in 1923, the action being for damages for breach of the covenant to repair. The defence is that by arrangement between the parties made within a month after the lady died the lease was surrendered by the defendant to the plaintiff, and that thereby the defendant ceased to be under any liability upon that covenant. The defendant put his case in two ways: first, he said that the surrender was in the terms of a written offer orally accepted by him whereby the plaintiff expressly released him from all obligations past and future upon the covenants in the lease, and, secondly, that even if the plaintiff did not expressly release him, the legal effect of the surrender itself was to discharge him from all such obligations.

Upon the question whether there was an express agreement to release I have little to add to what has been said by my Lord. It appears to me that on the true construction of the letter of November 15, 1924, what the landlord agreed to do was this, that if the defendant would pay rent up to Lady Day and give up possession at the end of February, the landlord would be willing to discharge him from the tenancy, and would release him from such of his obligations as he would naturally be released from on the acceptance by the landlord of a surrender. To my mind the doctrine as to the construction of general words in a release applies, and it seems to me plain that the only matters that the parties had been contemplating were the surrender and future liabilities. Existing liabilities were not in their contemplation at all, and therefore

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the letter cannot be construed as a release of the defendant from his liability to pay damages for the breaches of the covenant that had already accrued.

The other branch of the defendant's case was that upon which the decision of the learned judge below proceeded, and he came to the conclusion that the mere surrender of a tenancy by the tenant precludes the landlord from further enforcing against the tenant any of his obligations under the lease, whether those obligations had already accrued before the date of the surrender or had not. With great respect I think that that is wrong, and the contrary has been the law at least from the days of Lord Coke. In *Walker's Case* (1) the following passage occurs: "And it was agreed, that if the lessor enters for condition broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the arrearages due before the condition broken, or the surrender made, as it appears by F. N. B. 120," and other passages which he quotes. That assumes that the action of debt, which was the real action, still existed for arrearages notwithstanding the surrender; but there is direct authority that an action exists on the covenant. In Sheppard's Touchstone, ch. 17, at p. 301, it is said: "If lessee for life, or years, break a covenant with his lessor, and after surrender his estate to him, his breach of covenant is not hereby saved; for the lessor may have an action of covenant still, notwithstanding the surrender." And in Platt on Leases, ed. 1847, vol. ii., p. 356, it is said: "A right of action once accrued to the lessor against the lessee is not defeated by the expiration of the lease; nor by the surrender by the lessor of his reversion (as if he be tenant for life) to a paramount reversioner; nor by the lessee's surrender of his term to the lessor." That is followed by the case in the House of Lords to which my Lord has referred, *Attorney-General* v. *Cox* (2), and by a series of other cases which have been referred to in argument, and which it is not necessary to mention. The only case which has been cited to the contrary was *Ex parte Allen* (3), one in

(1) (1587) 3 Rep. 23*b*. (2) 3 H. L. C. 240. (3) 20 Ch. D. 341.

which a question arose as to the effect of a disclaimer of a lease by a trustee in bankruptcy under s. 23 of the Bankruptcy Act, 1869, which section provides that: "The property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date." A passage in the judgment of Cotton L.J. is said to go to the full extent of saying, entirely contrary to the whole of the law up to that time, that if a lease is surrendered the whole of the tenant's liability on the covenants is wiped out. But it appears to me that that is not what the Lord Justice meant. His language must be read in connection with the particular facts with which he was there dealing. That was a case in which a lessee of land and chattels upon it held at one entire rent became bankrupt. The chattels vested in the trustee under s. 15 of the Bankruptcy Act, 1869, the order and disposition clause, as from the date of the act of bankruptcy. The trustee disclaimed the lease of the land under s. 23 as from the date of adjudication. It was held that s. 15 must be read along with s. 23, with the result that the disclaimer operated as a surrender of the chattels as well as of the land. The trustee could not be relieved from the burden of the land and at the same time take the benefit of the chattels. What the Lord Justice's mind was addressed to was what he was saying in the first part of the passage that has been quoted: "A surrender of a lease involves this, that there shall be a giving to the lessor of the entirety of the property which is comprised in the lease." He was not thinking of the question whether a surrender released the tenant from liability for past breaches of covenant, for that was a question which had no relation to the facts before him. In the later case of *Ex parte Hart Dyke* (1), in which Sir George Jessel confined his remarks to future liabilities, Cotton L.J. himself limited his proposition in the same way: "As regards covenants which were only to take effect after the period at which the surrender takes effect, they are gone." He would not have so limited it if

(1) 22 Ch. D. 410, 428.

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he had in fact entertained the view that a surrender applied to covenants which had already taken effect before the surrender. For these reasons I am of opinion that there is no answer to the plaintiff's claim in respect of the breaches of the covenant to repair accrued before the date of the surrender, and that the appeal must be allowed.

SARGANT L.J. I am of the same opinion. As regards the question of the effect of a surrender, if that were the true question on which the liability of the defendant depended, it seems to me that we are entirely governed by the decision in *Dalton* v. *Pickard* (1) in this Court, and I desire to add nothing to the remarks which have been made by my Lord and Atkin L.J. on that point.

With regard to what I consider to be the real matter which determines the respective rights of the parties—namely, the letter of November 15, 1924, which has been treated by the parties as a definite offer definitely accepted, I would say this: it does not seem to me to be necessary to resort to the principles under which general words in a release may be controlled. The cases in which that has been done are cases in which there were words in the release which, taken without qualification, would have applied to almost every cause of action, including the cause of action then before the Court, such for instance as *London and South Western Ry. Co.* v. *Blackmore*. (2) There the release was a release of all claims and damages for the causes therein mentioned "or on any other account or ground whatsoever," and those words, though of the utmost possible generality, were held to be controlled by the context. Here it does not seem to me to be necessary to apply that doctrine, because when once it is considered that what the parties were talking about was not any question of the amount that had to be paid under the covenants, but was a proposal for an earlier determination of the lease in default of a licence to let the premises for six months furnished, the terms of the letter appear to be in favour of the appellant's contention. The letter runs thus:

(1) See note at end of this case. (2) L. R. 4 H. L. 610.

"If Lady Humphery's executor agrees to pay the rent of 'The Grove' up to March 25, 1925, and gives up possession not later than the end of February next, my brother is willing to release him." Release him from what? That is the question we have to determine. I should have thought that its plain and obvious meaning was that the defendant was to be released from his obligation to retain possession until September 29, 1925, and it seems pretty clear from the subsequent letters that that was what the defendant understood by it. If that be so the matter is really at an end.

I would only add this, that, in view of the language of the third covenant in the lease, we could not order a sum of 300*l.* to be paid under the special terms of that covenant alone, because the covenant is to pay at the expiration or sooner determination of the lease, and, upon the authority of the cases that have been cited, it is clear that that covenant could not be enforced when once the lease had been put an end to; but as I understand that both parties are willing to read it as being more than a covenant to pay the money in a certain event, and as amounting to a quantification of the damages that might be payable for breaches of the covenant to repair, we have power to order payment of that sum; and to do so will be to the advantage of the defendant, for instead of being put to the expense of an inquiry as to what it would cost to make good the breaches, he will be let off with the lighter burden of having to pay the agreed sum.

Appeal allowed.

Solicitor for the appellant: *C. S. Moore.*
Solicitors for the respondent: *Druces & Attlee.*

NOTE. *Applied.* OADES *v.* SPAFFORD. [1948] 2 K. B. 545

1911. May 3.

[IN THE COURT OF APPEAL.]

DALTON *v.* PICKARD.

Appeal from the county court judge of Canterbury on a case stated by an arbitrator under the Agricultural Holdings Act, 1908.

The defendant held a farm known as "Tonford Farm" as tenant to the

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plaintiffs under a lease which in the ordinary course would not expire till October, 1913. In January, 1910, the landlords were desirous of getting possession of the farm, and on January 15 there was a meeting between them and the tenant at which certain terms were proposed with respect to the surrender of the lease by the tenant. At that meeting nothing was said about the landlords' claim for dilapidations, or that the tenant would be discharged from his liability for them if he surrendered. Eventually the tenant made the following proposal in the form of a letter dated January 15: "I am willing to give up the whole of my holding known as 'Tonford Farm' at Michaelmas next providing I am allowed fair valuation, and the whole of my live and dead stock to be included in the valuation, and also an allowance of a half-year's rent. (Signed) S. H. Pickard." That proposal was accepted by the landlords' solicitors by a letter dated January 18: "We are acting for the (landlords). Your letter of the 15th inst. stating you are willing to give up the whole of your holding known as 'Tonford Farm' at Michaelmas next provided you are allowed a fair valuation and the whole of your live and dead stock to be included in the valuation, and also an allowance of a half-year's rent, has been handed to us, and we are instructed on behalf of our clients to accept your terms. Your tenancy will therefore cease on the 11th October next. (Signed) Cranfield and Wheeler." In pursuance of that agreement the tenant surrendered possession of the farm on October 11, 1910. The parties went to arbitration under the Agricultural Holdings Act, and the landlords put in a schedule of dilapidations. The tenant protested that when he entered into the agreement he understood that he was to get as consideration for the surrender the value of his live and dead stock and half a year's rent, free of all cross claims for dilapidations. He said that if he had known that claims were going to be made against him for dilapidations he would not have surrendered. The arbitrator, in his special case, submitted the following question of law for the opinion of the county court judge: Whether the landlords are entitled, in view of the circumstances under which the tenancy was determined, and giving due consideration to the letters of January 15 and January 17, to an amount for dilapidations claimed in the schedule. The county court judge held that the landlords were not so entitled. The landlords appealed.

St. John Raikes for the appellants.
Foà for the respondent.

VAUGHAN WILLIAMS L.J., referring to the covenants in the lease, said: It is said that some of those covenants are covenants that raise a continuing obligation. With respect to the future I think that the obligations have come to an end, but in so far as they have been breaches of a covenant anterior to the surrender I think the right of action accrued. There is no pretence here for saying, and it has not been argued, that the surrender amounts to an accord and satisfaction of the breaches in respect of which causes of action have accrued. I have very little to add here, except that the arbitrator, in stating the question for the opinion of the Court, lays stress on "the circumstances under which the tenancy was determined" and the giving of "due consideration to the letters of January 15 and January 17." I have those letters before me, and I have got to construe them. (His Lordship read them.) I see nothing in those letters which deprives the landlords of

any of their rights, on the valuation being taken, to bring in their claim for dilapidations or for bad cultivation. It is quite plain that the tenant, by his own letter, anticipates that there will be a valuation. A valuation is a very well known thing in agriculture, and there are always two sides to the matter. There is the landlords' claim, and there is the tenant's claim, and then the balance is what ultimately has to be paid. I see nothing in this agreement and nothing in the bare fact of the surrender to deprive the landlords of their right to bring in their claim for dilapidations when the valuation is taken. Of course their right is more or less qualified by the provisions of the statute law, especially those of late years, but there is nothing in this agreement to take away from the landlords their right to bring in their side of the account when the valuation is made.

FLETCHER MOULTON L.J. I am of the same opinion. It appears to me that the letter of January 15 is an offer on the part of the tenant to surrender his lease at Michaelmas for a certain consideration moving to him from the landlords. No question arises here about that consideration. It is partly a liquidated sum of money—namely, half a year's rent—and partly a claim to be liquidated by the process of valuation. The landlords are prepared to give to the tenant all that consideration, and what does he acquire thereby? He acquires a surrender of the lease at Michaelmas with all the legal consequences.

A question has been raised as to what are the rights of a landlord who has accepted from his lessee a surrender of the lease before the term is expired. To my mind it is clear beyond dispute that by accepting that surrender, and terminating the continuance of the lease, he does not in any way waive or get rid of accrued rights of action in respect of breaches of the covenants of the lease during the time that the lease existed. His lessee entered into those covenants, and was bound to keep them, and if he broke them there were vested causes of action, and there is nothing in the legal operation of the surrender which takes away from the reversioner any of those vested causes of action. Of course the damages must be properly assessed by the arbitrator, but it appears to me that our directions to him must be that by the effect of the surrender, following on these two letters, the landlords waived or deprived themselves of none of the rights which they would have in a case of an ordinary surrender.

FARWELL L.J. I am of the same opinion. The case really depends on the construction of these letters, because, notwithstanding the somewhat wide range over which the argument has travelled, the law has been settled for centuries that the mere acceptance of a surrender does not affect the rights of action under the lease accrued before that surrender. Now the question is between the landlords and the tenant, the tenant having bargained certain things for himself, and the landlords having accepted the surrender on the terms stated by the tenant. So far as the terms stated are concerned they do not express or suggest any waiver by the landlords of any legal right which they possessed. In order to get rid of a liability under the covenants the tenant would have to show either release or accord and satisfaction. Now it is quite plain that the surrender by itself is not an accord and satisfaction. I have been looking at some of the older cases. I will go back to

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Walker's Case (1): "It was agreed, that if the lessor enters for condition broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the arrearages due before the condition broken, or the surrender made, as appears by F. N. B. 120." I find the same law stated in Platt on Leases, a great authority, the author of which became a Baron of the Exchequer: "A right of action once accrued to the lessor against the lessee is not defeated by the expiration of the lease, nor by the surrender by the lessor of his reversion (as if he be tenant for life) to a paramount reversioner, nor by the lessee's surrender of his term to the lessor," and Lord Cottenham states the law as perfectly well settled and clear in *Mason* v. *Blogg*. That being so, here we are dealing with those rights which had accrued to the landlord as rights of action before the surrender, and there is nothing whatever to discharge or get rid of those rights. The measure of damages is the amount by which the reversion has been injured by the breach of covenant. All those matters are easily ascertainable by the valuer. The case must go back with a direction to the valuer to ascertain the values in the way that has been pointed out.

Appeal allowed.

Solicitors for the appellant: *Cranfield & Wheeler, St. Ives, Hunts.*

(1) 3 Rep. 23*b*.

J. F. C.

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